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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Courts of Exchequer & Exchequer Chamber,

FROM

MICHAELMAS TERM, 3 WILL. IV.

TO

TRINITY TERM, 3 WILL. IV., BOTH INCLUSIVE;

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS:

BY

CHARLES CROMPTON, ESQ., OF THE INNER TEMPLE,

AND

R. MEESON, ESQ., OF THE MIDDLE TEMPLE,

BARRISTERS AT LAW.

VOL. I.

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JUDGES
OF
THE COURT OF EXCHEQUER,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honorable JOHN SINGLETON, Baron LYNDHURST,
Lord Chief Baron.

BARONS.

Sir JOHN BAYLEY, Knt.
Sir JOHN VAUGHAN, Knt.
Sir WILLIAM BOLLAND, Knt.
Sir JOHN GURNEY, Knt.

Sir WILLIAM HORNE, Knt., Attorney-General.
Sir JOHN CAMPBELL, Knt., Solicitor-General.

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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

EXCHEQUER OF PLEAS, MICHAELMAS TERM, 3 WILL. IV.

MEMORANDA.

IN the early part of this term, died the Right Honorable *Charles, Lord Tenterden*, Lord Chief Justice of the Court of *King's Bench*, having presided in that Court since *November, 1818*.

1832.

He was succeeded by Sir *Thomas Denman*, Knight, his Majesty's Attorney-General, who was called to the degree of Serjeant-at-Law, and gave rings with the motto—" *Lex omnibus una*;" and, on the 8th day of *November*, was sworn into his office, before the Lord High Chancellor, and took his seat on the bench on the following day.

Sir *William Horne*, Solicitor-General to his Majesty, succeeded to the office of Attorney-General; and *John Campbell*, of Lincoln's Inn, Esquire, one of his Majesty's Counsel, was appointed Solicitor-General to his Majesty, and was knighted.

On the first day of this term, *John Beames*, *Robert*

Mounsey Rolfe, and *Clement Tudway Swanston*, of Lincoln's Inn, Esquires, and *Henry Hall Joy*, of the Inner Temple, Esquire, having been, during the preceding vacation, appointed his Majesty's Counsel learned in the Law, were called within the bar, and took their seats accordingly.

REGULÆ GENERALES.

I.

Writ to contain the name of all the defendants in the action.

IT IS ORDERED, That every writ of *summons*, *capias*, and *detainer*, shall contain the names of all the defendants, (if more than one), in the action; and shall not contain the name or names of any defendant or defendants in more actions than one (*a*).

Fees.

2. **IT IS FURTHER ORDERED**, That the following fees shall be taken:—

For signing all writs for compelling an appearance, whether of *summons*, *distringas*, *capias*, or *detainer*, whether the same shall be the first writ or an *alias* or *pluries* writ, and whether the same shall issue into the same county as the preceding writ, or into a different county. 0 2 6

For sealing the same. 0 0 7

For entering an appearance for every defendant. 0 1 0

Unless an appearance shall be entered for more than one defendant by the same attorney, and in that case for every additional defendant. . 0 0 4

Day of service

3. **IT IS FURTHER ORDERED**, That the person serving a

(*a*) These rules are made in pursuance of the stat. 2 Will. 4, c. 39, s. 14.

writ of summons shall, within three days at least after such service, indorse on such writ the day of the week and month of such service, otherwise the plaintiff shall not be at liberty to enter an appearance for the defendant according to the statute; and every affidavit upon which such an appearance shall be entered shall mention the day on which such indorsement was made.

to be indorsed
on writ.

4. IT IS FURTHER ORDERED, That the Sheriff or other officer or person to whom any writ of *capias* shall be directed, or who shall have the execution and return thereof, shall, within six days at the least after the execution thereof, whether by service or arrest, indorse on such writ the true day of the execution thereof, and, in default thereof, shall be liable in a summary way to make such compensation for any damage which may result from his neglect, as the Court or a Judge shall direct.

Day of execution to be indorsed on *capias*.

5. IT IS FURTHER ORDERED, That R. 2 of H. T. 1832 shall be applicable to all writs of summons, *distringas*, *capias*, and detainer, issued under the authority of the said act, and to the copy of every such writ (*a*).

Rule 2, H. T. 1832, applicable to new writs.

6. IT IS FURTHER ORDERED, That any *alias* or *pluries* writ of summons may, if the plaintiff shall think it desirable, be issued into another county, and any *alias* or *pluries* writ of *capias* may be directed to the Sheriff of any other county, the plaintiff in such case upon the *alias* or *pluries* writ of summons describing the defendant as late of the place of which he was described in the first writ of summons, and upon the *alias* or *pluries* writ of *capias* referring to the preceding writ or writs as directed to the Sheriff to whom they were in fact directed.

Alias and *pluries* writs may be directed into other counties.

Form of.

7. IT IS FURTHER ORDERED, That the *alias* or *pluries*

Alias or *pluries* summons.

(*a*) Vide 2 C. & J. 199.

B 2

writ of summons into another county shall be in the following form—

William the Fourth &c.

To *C. D.*, of —, in the county of —, late of —,
in the county of [*original county*.]

WE command you, as before [*or often*] we have commanded you &c. [*as in the writ of summons No. 1 in the schedule of the said act (a).*]

And that the *alias* and *pluries* writ of *capias* shall be in the following form—

William the Fourth &c.

To the Sheriff of —

*Alias or pluries
capias.*

WE command you, as heretofore we have commanded the Sheriff of —, that you omit not &c. [*as in the writ of capias No. 4, in the schedule of the said act (a).*]

*Non omittas
clause in dis-
tringas without
fee.*

8. IT IS FURTHER ORDERED, That in every writ of *distringas* issued under the authority of the said act, a *non omittas* clause may be introduced by the plaintiff without the payment of any additional fee on that account.

*Name of attor-
ney in the coun-
try to be indors-
ed on writ as
well as name of
agent.*

9. IT IS FURTHER ORDERED, That when the attorney actually suing out any writ shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the said writ.

*Writ irregular
but not void for
want of indorse-
ments.*

10. IT IS FURTHER ORDERED, That if the plaintiff or his attorney shall omit to insert in or indorse on any writ or copy thereof any of the matters required by the said act (*b*) to be by him inserted therein or indorsed thereon, such writ or

(a) 2 Will. 4, c. 39.

(b) *Ib.* s. 12, and Sch.

copy thereof shall not on that account be held void, but may be set aside as irregular upon application to be made to the Court out of which the same shall issue, or to any Judge.

11. IT IS FURTHER ORDERED, That upon all writs of *capias*, where the defendant shall not be in actual custody, the plaintiff at the expiration of eight days after the execution of the writ, inclusive of the day of such execution, shall be at liberty to declare *de bene esse* in case special bail shall not have been perfected. And if there be several defendants, and one or more of them shall have been served only and not arrested, and the defendant or defendants so served shall not have entered a common appearance, the plaintiff shall be at liberty to enter a common appearance for him or them and declare against him or them in chief, and *de bene esse* against the defendant or defendants who shall have been arrested and shall not have perfected special bail (a).

Declaring *de bene esse* where defendant not in actual custody on *capias*.

Where one arrested and others served.

12. IT IS FURTHER ORDERED, That in case the time for pleading to any declaration, or for answering any pleadings, shall not have expired before the 10th day of *August* in any year, the party called upon to plead, reply, &c., shall have the same number of days for that purpose after the 24th day of *October* as if the declaration or preceding pleading had been delivered or filed on the 24th of *October*; but in such cases it shall not be necessary to have a second rule to plead, reply, &c. (a).

Where time to plead, &c., expires after 10th *August*, the same time is to be reckoned from 24th *Oct.* as if the declaration, &c., had then been delivered.

No further rule to plead.

13. IT IS FURTHER ORDERED, That in case a Judge shall have made an order in the vacation for the return of any writ issued by authority of the said act, or any writ of *ca. sa.*, *fi. fa.*, or *elegit* on any day in the vacation, and such

If order to return writ in vacation be made a rule of Court, next term an attachment may

(a) 2 Will. 4, c. 39, s. 11.

issue without
service of that
rule.

order shall have been duly served, but obedience shall not have been paid thereto, and the same shall have been made a rule of Court in the term then next following, it shall not be necessary to serve such rule of Court, or make any fresh demand of performance thereon; but an attachment shall issue forthwith for disobedience of such order, whether the thing required by such order shall or shall not have been done in the mean time (a).

Writs issued
without author-
ity of attorney
whose name is
indorsed to be
stayed.

14. IT IS FURTHER ORDERED, That if any attorney shall, as required by the said act, declare that any writ of summons or writ of *capias*, upon which his name is indorsed, was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed until further order (b).

Title of decla-
ration.

15. IT IS FURTHER ORDERED, That every declaration shall in future be intituled in the proper Court, and of the day of the month and year on which it is filed or delivered, and shall commence as follows—

Declaration after Summons.

Commencement
by summons.

[*Venue.*] *A. B.* by *E. F.* his attorney [*or*, in his own proper person] complains of *C. D.*, who has been summoned to answer the said *A. B.* &c.

Declaration after Arrest where the Party is not in Custody.

Commencement
of declaration on
capias where
defendant is not
in custody.

[*Venue.*] *A. B.* by *E. F.* his attorney, [*or*, in his own proper person] complains of *C. D.* who has been arrested at the suit of the said *A. B.* &c.

Declaration where the Party is in Custody.

Commencement
of the declara-
tion on *capias*

[*Venue.*] *A. B.* by *E. F.* his attorney [*or*, in his own proper person] complains of *C. D.* being detained at the

(a) See stat. 2 Will. 4, c. 39, s. 15.

(b) 2 Will. 4, c. 39, s. 17.

suit of the said *A. B.* in the custody of the Sheriff [or, the Marshal of the *Marshalsea* of the Court of *K. B.*, or the Warden of the *Fleet*.] where defendant is in custody.

Declaration after the Arrest of one or more Defendant or Defendants and where one or more other Defendant or Defendants shall have been served only and not arrested.

[*Venue.*] *A. B.* by *E. F.* his attorney [or, in his own proper person] complains of *C. D.*, who has been arrested at the suit of the said *A. B.* [or, being detained at the suit of the said *A. B.*, as before,] and of *G. H.*, who has been served with a writ of *capias* to answer the said *A. B.* &c. Commencement of declaration against several defendants some of whom have been arrested and the others served.

And that the entry of pledges to prosecute at the conclusion of the declaration shall in future be discontinued. Pledges discontinued.

II.

IT IS ORDERED, That the writ of *capias* and *distringas* which shall hereafter be issued out of the Superior Courts of law at *Westminster* into the counties palatine of *Lancaster* or *Durham* shall be directed to the Chancellor of the county palatine of *Lancaster* or his deputy there, or to the Bishop of *Durham* or his Chancellor there, and shall be in the following form— Writs into the counties palatine of *Lancaster* and *Durham*.

Writ of Distringas.

William the Fourth, &c.

To the Chancellor of our county palatine of *Lancaster* or his deputy there [or, “To the Reverend Father in God —, by divine providence, Lord Bishop of *Durham*, or to his Chancellor there,”] greeting—We command you that by our writ under the seal of our said county palatine, to be duly made and directed to the Sheriff of our said county palatine, you command the

said Sheriff [*or, if in Durham*, that by our writ under the seal of your bishoprick, to be duly made and directed to the Sheriff of the county of *Durham*, you cause the said Sheriff to be commanded], that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and distrain upon the goods and chattels of *C. D.* for the sum of 40*s.* in order to compel his appearance in our Court of ——— to answer *A. B.* in a plea of trespass on the case [*or, debt, or as the case may be*], and how he shall execute that our writ he make known to us in our said Court on the ——— day of ——— now next ensuing.

Witness ———, at *Westminster*, the ——— day of ———, in the ——— year of our reign.

Notice to be subscribed to the foregoing Writ.

In the Court of ———.

Between *A. B.*, plaintiff, and *C. D.*, defendant.

Mr. *C. D.*

Take notice that I have this day distrained on your goods and chattels in the sum of 40*s.* in consequence of your not having appeared in the said Court to answer to the said *A. B.* according to the exigency of a writ of summons, bearing *teste* on the ——— day of ———, and that in default of your appearance to the present writ within eight days inclusive after the return hereof, the said *A. B.* will cause an appearance to be entered for you, and proceed thereon to judgment and execution, or [*if the defendant be subject to outlawry*] will cause proceedings to be taken to outlaw you.

Writ of Capias.

William the Fourth &c.

To the Chancellor of our county palatine of *Lancaster*, or his deputy there, [*or, "To the Reverend Father in God ———, by divine providence Lord Bishop of Durham, or to his Chancellor there,"*] greeting—We com-

mand you that by our writ under the seal of our said county palatine to be duly made and directed to the Sheriff of our said county palatine, you command the said Sheriff [*or, if in Durham*, that by our writ under the seal of your bishoprick, to be duly made and directed to the Sheriff of the county of *Durham*, you cause the said Sheriff to be commanded that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and take *C. D.*, of —, if he shall be found in his bailiwick, and him safely keep until he shall have given him bail or make deposit with him according to law in an action on promises, [*or, of debt &c.*] at the suit of *A. B.*, or until the said *C. D.* shall by other lawful means be discharged from his custody: And that he further command him, that, in execution thereof, he do deliver a copy thereof to the said *C. D.*; and that the said writ do require the said *C. D.* to take notice, that within eight days after execution thereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of — to the said action; and that, in default of his so doing, such proceedings may be had and taken as are mentioned in the warning thereunto written or indorsed thereon; and that he further command the said Sheriff, that, immediately after the execution thereof, he do return that writ to our said Court, together with the manner in which he shall have executed the same, and the day of the execution thereof: or that, if the same shall remain unexecuted, then that he do so return the same at the expiration of four calendar months from the date thereof, or sooner if he shall be thereto required by order of the said Court, or by any Judge thereof. Witness —, at *Westminster*, the — day of —.

Memorandum to be subscribed to the Writ.

N. B. This writ is to be executed within four calendar months from the date hereof, including the day of such date, and not afterwards.

Warning to the Defendant.

1. If a defendant, being in custody, shall be detained on this writ, or if a defendant, being arrested thereon, shall go to prison for want of bail, the plaintiff may declare against such defendant before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution.

2. If a defendant, being arrested on this writ, shall have made a deposit of money according to the stat. 7 & 8 Geo. 4, c. 71, and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant, and proceed thereon to judgment and execution.

3. If a defendant having given bail on the arrest shall omit to put in special bail as required, the plaintiff may proceed against the Sheriff or on the bail bond.

4. If a defendant, having been served only with this writ and not arrested thereon, shall not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution.

Indorsements to be made on the Writ of Capias.

Bail for £——, by affidavit.

Or,

Bail for £——, by order [*naming the Judge making the order*] dated the —— day of ——.

This writ was issued by E. F. of ——, attorney for the plaintiff [*or plaintiffs*] within named.

Or,

This writ was issued in person by the plaintiff within named [*mention the city or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be.*]

(Signed by all the Judges.)

EXCHEQUER CHAMBER.

HARVEY v. FRENCH.

(In Error from the Court of Exchequer.)

1832.

LIBEL.—The declaration contained seven counts.

The fifth count stated that the defendant (below) falsely, wickedly, and maliciously did compose, print, and publish, and cause and procure to be composed, printed, and published, in a certain newspaper, a certain, false, scandalous, malicious, and defamatory libel, of and concerning the said plaintiff (below), containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the said plaintiff (below), that is to say: "Threatening letters.—The *Middlesex* Grand Jury have returned a true bill against a gentleman of some property, named *French*," (meaning the said plaintiff below), "with this, that the said plaintiff (below) will verify that the said defendant (below) thereby then and there meant to insinuate and have it understood, that the said plaintiff (below) had been suspected to have been, and had been, guilty of the offence of sending a letter, without any name or signature thereto subscribed, directed to one — *Trotter*, threatening to kill and murder the said — *Trotter*, a subject of the realm, with a view and intent to extort, to wit, at *Westminster* aforesaid, in the county aforesaid." The sixth count was similar to the fifth, slightly varying the statement of the publication.

At the trial, a general verdict was found for the plaintiff below, and judgment having been entered up accordingly, a writ of error was brought.

A count for a libel stated that defendant published a false libel of and concerning the plaintiff, containing, amongst other things, the false, &c., matter of and concerning the plaintiff, that is to say: "Threatening letters.—The *Middlesex* Grand Jury have returned a true bill against a gentleman of some property, named *French*," (meaning the said plaintiff,) "with this, that the said plaintiff will verify that the said defendant thereby then and there meant to insinuate and have it understood, that the said plaintiff had been suspected to have been, and had been, guilty of the offence of sending a letter without any name or signature thereto subscribed, directed to one — *Trotter*, threatening

to kill and murder the said — *Trotter*, a subject of the realm, with a view and intent to extort:"—*Held*, first, that the innuendo at the conclusion of the count was bad; and secondly, that the matter was libellous without such innuendo, which might be rejected as surplusage.

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Platt, for the plaintiff in error.—Where the libellous quality of the words is derived from circumstances extrinsic of the words themselves, the connection with those circumstances must be shewn by introductory averment of the facts; by shewing that the libel related to the facts averred; and connecting them together by innuendo, if necessary. In *Barham's* case (a), the words were—"Master *Barham* did burn my barn;" innuendo—"a barn filled with corn;" and it was there held that the innuendo was bad, because it was not an explanation of what was said before, but an addition to it. The latter part of the doctrine laid down in *Barham's* case, that words are to be taken *in mitiori sensu*, has been since overruled; but the doctrine, that words cannot be extended by innuendo, was fully recognised in the case of *Rex v. Horne* (b); and the rule is there laid down, that an innuendo means nothing more than the words "*id est*," "*scilicet*," or "meaning," or "afore-said," as explanatory of a subject-matter sufficiently expressed before; and that it cannot extend the sense of the expressions in the libel, unless something is put upon the record for it to explain. Now to apply that doctrine to the present case; it is alleged by this innuendo, "that the defendant meant to insinuate, that the plaintiff had been guilty of sending a letter without any name thereto subscribed, directed to one — *Trotter*, threatening to kill and murder the said — *Trotter*." Now, if it had been averred in the former part of this count, that such letter had been sent to *Trotter*, &c., and the count had gone on to aver that this libel was published of and concerning such letter, and of and concerning the plaintiff, that would have been sufficient to connect the libel with the prefatory averment, and then the innuendo would properly have explained that. The same rule applies to the words "of and concerning," in a libel, as to a *colloquium* in verbal slander.

(a) 4 Rep. 20 a.

(b) Cowp. 684.

There it is necessary to aver not only the previous matter, but that the words were spoken "of and concerning" that matter. *Hawkes v. Hawkey* (a) was a stronger case than this, because in that case there was a prefatory averment, "that the defendant had put in his answer on oath to a bill filed against him," and all that was wanting was the statement of a *colloquium* of and concerning the answer; for the innuendo was, "thereby meaning and insinuating, that the plaintiff had perjured himself in what he had sworn in his aforesaid answer to the bill so filed against him;" so that the innuendo, if it could have been supported, was quite large enough to impute that the plaintiff had perjured himself in the answer mentioned in the prefatory averment. In the present case it ought to have been predicated, not only that such letter existed, but that the libel was of and concerning such letter; and the innuendo cannot supply the want of such averments. *Holt v. Scholesfield* (b), *Craft v. Boite* (c), *Rex v. Marsden* (d). In the case of *Rex v. Alderton*, cited in *Rex v. Marsden*, the information contained every thing, except the very words "of and concerning," and it was decided to be bad for want of those words. Hence, as regards the letter, and the imputation contained therein, as there is no averment that any such letter was sent, and that the libel was of and concerning the letter, it must be taken as if there was no innuendo. Therefore, this count must be read, as if the innuendo was not contained in it. Then what imputation do the libellous words cast on the plaintiff? "Threatening Letters—The *Middlesex* Grand Jury have returned a true bill against a gentleman of some property, named *French*"—not a word here about sending a letter threatening to kill and murder. It might be for a nuisance, or an assault. Now, although the rule as to what is actionable in actions for libel is more extensive

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(a) 8 East, 427.

(b) 6 T. R. 694.

(c) 1 Wm. Saund. 243-4.

(d) 4 M. & S. 164.

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than in actions for words, it does not follow that every offensive statement, or every statement which a man may not like, or every statement of matter, which, if true, might render him liable to be sued or prosecuted, is necessarily libellous. Thus, to publish of a man, that a bill of indictment for an assault was found against him, would not be actionable. [*Taunton, J.*—Here the words begin, “Threatening Letters.”]—Yes, but how do they relate to *French*? They are unmeaning words—quite unconnected with the words that follow. There is nothing here to shew that the bill referred to threatening letters. [*Parke, J.*—Your argument would equally apply if the word “Murder” had been there.] In the case of *Lewis v. Clement (a)*, there was a heading to the supposed libel, namely, “Shameful Conduct of an Attorney;” the defendant pleaded a justification that the libel was a true report of certain proceedings in the Insolvent Debtors’ Court, but took no notice of the heading. The Jury found for the defendant on the justification. There was afterwards a motion for judgment *non obstante verdicto*, and it was then argued, that the comment which was contained in the title was warranted by the facts stated in the libel, which the Jury had found to be true; and that if the facts which justified the title were a legal publication, it would follow, that the comment itself was equally so. But the Court held, that they could not explain the heading by what followed, and, therefore, that the pleas were bad. Then, if the heading is not to be explained, by what follows, in favour of a defendant, neither can it in favour of a plaintiff. There is nothing in the following words to connect them with the libel. Then if the words “Threatening Letters” are left out, what is there here to shew any libel of the plaintiff?

White, contra.—This is not an innuendo, but a substan-

(a) 3 Barn. & Ald. 702.

tive averment. *Secondly*, if it be an innuendo, it may be rejected as surplusage; and then, still this count may be sustained, as the matter is libellous in itself. *First*, it is not an innuendo, but a substantive averment. *Woolnoth v. Meadows* (a). This case is, distinguishable from *Rex v. Horne*, as this is an averment, and not merely an innuendo. [*Tindal*, C. J.—What is the difference? In this case the words are, “then and there meant,” and in the other, “then and there meaning.”] Even taking this to be an innuendo, and therefore bad as introducing new matter, it may be rejected as surplusage. *Roberts v. Camden* (b). There Lord *Ellenborough* says—“For, admitting most clearly, that new matter cannot be introduced by an innuendo, yet, where such new matter is not necessary to support the action, an innuendo without any *colloquium* may well be rejected as surplusage.” Then the question is, are these words libellous? I submit that they clearly are, and that they may be read together. But if not, is it not a libel to write of a gentleman, that a Grand Jury have found a true bill against him? It must necessarily be taken to have been for some indictable offence, for some offence punishable by law. Not only imputing an offence, but imputing any want of moral virtue, constitutes a libel. *Clement v. Chivis* (c). So, in *Woodard v. Dowsing* (d), it was held, that, in written slander, whatever tends to bring a party into public hatred and disgrace, is actionable. And Mr. Justice *Holroyd* there says, that which tends to degrade is a libel. In *Lord Churchill v. Hunt* (e), the words were held to be libellous, because they imputed mere want of feeling and indecorum. The doctrine, that words are to be read *in*

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(a) 5 East, 463.

(b) 9 East, 92.

(c) 9 Barn. & Cress. 174.

(d) 2 Man. & Ryl. 74.

(e) 1 Chitty's Rep. 480.

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mitiori sensu, has been long since exploded. After verdict, at all events, it must be taken that these words were "of and concerning" the plaintiff; and it is clear that the words, in common sense, impute that the Grand Jury have found a true bill against the plaintiff for sending "threatening letters." As to *Hawkes v. Hawkey*, and *Holt v. Scholefield*, in those cases, without the introductory averment, the words were not libellous. In *Craft v. Boite*, the count might have been said to be bad on the same grounds as this; but *Saunders*, who argued the case, did not take the objection. [*Tindal*, C. J.—Mr. Serjt. *Williams* mentions it in his notes.] The words, "The *Middlesex* Grand Jury have returned a true bill against a gentleman named *French*," are libellous alone, but taken with the words "threatening letters," are most clearly so. No person reading such a statement in the newspapers could understand it otherwise. In *Smith v. Carey (a)*, the words were, "He lives by swindling and robbing the public;" and there Lord *Ellenborough* said, the words were in themselves actionable; and if there had been no innuendo as to their meaning, the plaintiff would certainly have been entitled to a verdict.

Platt, in reply.—*Woolnoth v. Meadows* is quite inapplicable to the present case. In that case the words themselves contained libellous matter. Here they do not. In *Roberts v. Camden*, the words themselves imputed "perjury." It is not said that a bill was found against the plaintiff for sending threatening letters; that connection is wanting. It is said on the other side, that to write of a gentleman, that a true bill has been found against him, is libellous; and cases were cited to shew, that writing anything tending to degrade, is libellous. That is admit-

(a) 3 Campb. 460.

ted; but to write of a man, that a true bill had been found against him for non-repair of a bridge, or a road, or a nuisance, would not impute a want of moral virtue, or tend to degrade. Therefore, to write of a gentleman, that a true bill had been found against him is not libellous. In *Clement v. Chivis*, the words were clearly libellous. So, in *Woodward v. Dowsing*, and *Lord Churchill v. Hunt*, the words were clearly libellous, because they tended to degrade. It is submitted, therefore, that these words are not libellous alone. But then it is said, that, at all events, they are so, if connected with the words, "threatening letters." But they are not so connected. There is collocation, but not connection. Even assuming that they are so connected, for any thing that appears, they might have been letters written by the plaintiff below, threatening to bring this action. As the plaintiff has not stated or shewn the meaning of them, the Court cannot conclude that they were unlawful threatening letters within the meaning of the statute. The declaration ought to have a prefatory averment, that such a letter had been sent to Mr. *Trotter*, threatening to kill and murder him; and that the libellous matter was published of and concerning that letter, and of and concerning the plaintiff. All the cases on this subject are collected in *Starkie on Criminal Pleading*, 132; and they shew, that when the libellous quality is derived from circumstances extrinsic of the words, the connection with those circumstances must appear upon the record.

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LORD TENTERDEN, C. J.—We are of opinion, that the innuendos in the fifth and sixth counts of this declaration are not warranted by the preceding words in those counts; all that goes before is, that a threatening letter had been sent by the plaintiff; but it by no means follows, that a threatening letter had been directed to any person of the name of *Trotter*, or, that it contained any threat to kill or murder the person to whom it was addressed, as averred in

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that innuendo. Unless, therefore, these counts can be sustained without the innuendo, the judgment ought to be reversed. We are, however, of opinion, that these counts, after rejecting that averment, may be sustained without it. Then the count will stand thus: "Threatening Letters.—The *Middlesex* Grand Jury have returned a true bill against a gentleman of some property, named *French*," (meaning the said plaintiff). It has been contended by Mr. *Platt*, that the Court cannot intend, that the bill of indictment found by the Grand Jury is a bill of indictment for sending threatening letters; but we are all agreed, and it is quite clear, from all the modern authorities, that a Court must read these words in the sense in which ordinary persons, or in which we ourselves out of Court, reading this paragraph, would understand them; and that it cannot be read otherwise than that the Grand Jury had found a true bill against the plaintiff for sending threatening letters. A bill of indictment for sending a threatening letter must import an unlawful threatening letter.

Judgment affirmed (*a*).

(*a*) See Cro. Eliz. 609.

Exch. of Pleas.

THACKRAH v. SEYMOUR.

An old footway passed from a public highway over wastes to old inclosures into another public highway. By an award of the commissioners under a local

TRESPASS *quare clausum fregit*. Pleas—general issue, and justifications under rights of way.

At the trial before Lord *Lyndhurst*, C. B., at the *Middlesex* Sittings, after last *Trinity* Term, the defendant proved a right of way by prescription.

act for inclosing the wastes, the part of the waste over which the footway ran was allotted; but the footway was not mentioned in the award, nor was any new way set out therein.

No power to stop up ways over old inclosures was given by the particular Inclosure Act. Held, that the old footway was not extinguished by the allotment.

The plaintiff contended that the way had been extinguished by an award made in 1818, by the commissioners under 53 Geo. 3, c. 174, for inclosing lands in the parish of *Isleworth*, &c. &c.

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The foot-way, which was not mentioned in the award, led from a public carriage road over the waste lands, and over old inclosures, and over other waste lands into another public highway.

The plaintiff contended at the trial, that the allotment of these waste lands operated as an extinguishment of the way; and relied on the 11th section of the General Inclosure Act, 41 Geo. 3, c. 109.

The defendant relied upon *Harber v. Rand* (a), and *Logan v. Burton* (b), and upon the 8th section of the "General Inclosure Act," which requires the order of two justices, when the commissioners are empowered to stop up any old road. The learned Chief Baron was of opinion that the way had not been extinguished; and the defendant had a verdict.

Jervis now moved for a new trial.—The proviso in the 8th section of the 41 Geo. 3, c. 109, applies only where the commissioners are expressly authorized by the particular Inclosure Act to stop up ways. *Harber v. Rand* and *Logan v. Burton* are distinguishable from this case. In both those cases the power was given to the commissioners by the local act. *White v. Reeves* (c) is more applicable to the present case. There it was held, that the plaintiff having an allotment made to him, by a commissioner under the Inclosure Act, of land over which the defendants had a private right of way before the passing of the act, but which was not noticed or described amongst those set out by the

(a) 9 Price, 58.

(b) 5 B. & C. 513; 8 D. & R. 299.

(c) 2 B. Mo. 23.

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commissioner appointed for executing that act (the operation of which, as to the powers of setting out or stopping up roads, was left to the General Inclosure Act, 41 *Geo. 3*, c. 109), may, under the 11th section of the latter statute, justify the stopping up of such way, without any directions from the commissioner for that purpose in the award, or any other road being set out or appointed in lieu of it.

[Lord *Lyndhurst*, C. B.—Try it in this way:—If a person has a house near the waste, and the road to it goes for a few yards over the common, but, for the greater part, over private and intermediate old inclosures, is the road lost by the allotment of the common?

Bayley, B.—Here there is one entire way, part leading over private land, and part over the waste. The commissioners say nothing as to the way. Is it to be said that the whole way is extinguished?

Lord *Lyndhurst*, C. B.—We will look into the clauses, and communicate our opinion afterwards.]

The judgment of the Court was now delivered by—

Lord *LYNDHURST*, C. B.—The point in this case turned on a public footway; and the question was, whether this way was stopped up by the operation of an inclosure act. The description of the footway was this: it passed partly over ancient inclosures, and partly over waste lands, into the public highway. An inclosure act was passed several years ago, applicable to those waste lands, and the commissioners, in allotting those lands, did not set out any new way over them. The question, therefore, was, whether that part of the way which passed over the waste lands was extinguished. By the General Inclosure Act, 41 *Geo. 3*, c. 109, s. 8, the commissioners appointed under local Inclosure Acts are authorized to stop up and divert public ways over lands to be inclosed; but there is a pro-

viso in the 8th section, that where the commissioners have power under any Inclosure Act to stop up any old or accustomed road, leading through old inclosures, they shall not exercise that power without the consent of two justices of the peace. No such power was given in this case by the particular Inclosure Act; and it was contended, that this proviso in the General Inclosure Act had no application to the present case. But it is impossible to suppose that the commissioners have power to stop up ways over old inclosures; because, where such power is given to them, it is only given with the consent of two justices. Now, what was the nature of the way in this case? It was a way passing partly over old inclosures and partly over waste land. No power was given to the commissioners to stop up the part of the way passing over the old inclosures; yet, if they stopped up the part which led over the waste lands, they would thereby, in effect, stop up the way which passed over the old inclosures. Therefore, as the commissioners had no power, under the particular or general Inclosure Act, to stop up the way over the old inclosures; and as they have not set out any new way over the waste lands, we are of opinion that the old way still exists as it formerly did, over the waste lands, and over the old inclosures into the public highway; and, consequently, that there is no reason for granting a rule.

Rule refused.

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—◆—
VENNALL v. GARNER.

CASE for running down a ship. At the trial, before *Bolland, B.*, at the last *Durham* Assizes, it appeared that

In case for running down a ship, neither party can recover when both

are in the wrong; but the plaintiff may recover, although he might have prevented the collision, provided that he was in no degree in fault in not endeavouring to prevent it.

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VENNALL
v.
GARNER.

the defendant's ship had the wind free, and was a light ship, and that the plaintiff's ship was hard up in the wind, and laden. The defendant's ship ought to have given way, and it was clear that she was wrong in not doing so; but it was contended for the defendant, that though the defendant was wrong in not giving way, yet, that the plaintiff might have avoided the accident by altering his helm at the right moment. The plaintiff recovered a verdict, and

Alexander now moved for a new trial, citing *Vanderplank v. Miller* (a); and he urged, that it should have been left distinctly to the jury, whether there were any means of preventing the accident by care on the part of the plaintiff; and that, if such means existed, the plaintiff's neglect to use them deprived him of the right to sue.

BAYLEY, B.—The rule is, that the plaintiff could not recover, if his ship were in any degree in fault, in not endeavouring to prevent the collision. Here the plaintiff had a right to presume, that the defendant's ship would do that which she ought to do. I quite agree, that if the mischief be the result of the combined negligence of the two, they must both remain *in statu quo*, and neither party can recover against the other. In this case, however, it was made out, that the fault was wholly with the defendant: he had the wind, and should have given way, and the plaintiff had a right to expect that he would make room: he did not do so; and the consequence was, that the accident occurred, for which he is liable.

VAUGHAN, BOLLAND and GURNEY, Barons, concurred; and the rule was

Refused.

(a) 1 M. & M. 169.

Exch. of Pleas,
1832.

SLACK, *q. t.*, *v.* WILKINS.

DEBT for penalties against the defendant, for practising at the quarter sessions without being inrolled (*a*).

At the trial, before *Tindal*, C. J., at the last assizes for the county of *Cambridge*, the plaintiff had a verdict for two fifty-pound penalties, with leave to the defendant to move to enter a nonsuit.

The defendant was a gentleman who had been regularly admitted and inrolled long prior to 1815, and had taken out his certificate regularly until that year, but had omitted to do so in the years 1815 and 1816; since which time he had regularly taken it out until the present time.

Two acts of practising at the quarter sessions, in *January*, 1832, were proved at the trial.

An attorney neglected to take out his certificate in the years 1815 and 1816. In 1832, he practised at the Quarter Sessions:—*Held*, liable for the penalties under 22 *Geo.* 2, c. 46, s. 12.

Storks, Serjt., now moved to enter a nonsuit.

The plaintiff rests his right to recover on the 22 *Geo.* 2, c. 46, s. 12, conjointly with the 37 *Geo.* 3, c. 90, s. 31, by which the neglect to obtain a certificate renders the admission and enrolment null and void.

Now the object of the first statute was to prevent improper persons from practising at the quarter sessions, and the second act is merely a revenue act, and cannot have been intended to apply to an antecedent act, especially where the consequences are so penal.

Besides, in the penal part of the enactment, the words are merely “not being admitted and inrolled as aforesaid.” Here the defendant was admitted and inrolled.

[*Lord Lyndhurst*, C. B.—Does not, “as aforesaid” refer to the continuance on the roll? The prohibitory part has the words “unless he shall continue on the roll.”

(*a*) See 22 *Geo.* 2, c. 46, s. 12.

Exch. of Peace,
1832.

SLACK
v.
WILKINS.

The only point in the case is the omission of those words in the penal part.]

The subsequent statute, passed so many years after, has no specific allusion to the 22 *Geo. 2*.

[Lord *Lyndhurst*, C. B.—The effect is to make the inrolment null and void. The clause in question does omit the continuance in the penal part; but then it has the words “as aforesaid;” does not that mean the whole that went before, including the continuance? He had been inrolled, but the subsequent act rendered his inrolment null and void. Then he did not continue inrolled. The preceding prohibitory part forbids him to practise unless he continues inrolled; does not the expression “so inrolled as aforesaid,” in the penal part, comprehend the “continuing” to be inrolled? I think, clearly, it does.]

Storks then took some objections to particular counts, but was told by the Court, that, the verdict being general, they could not speculate upon what count it would be entered up, there being some good counts. He then urged, that in all the counts the offence was laid to have been committed “at a General Quarter Sessions of the Peace,” which, he said, was much too general a description of the Court of Quarter Sessions. But the Court thought it clearly sufficient.

Lord *LYNDHURST*, C. B.—I am of opinion that there should be no rule. By the 26 *Geo. 2*, c. 46, s. 12, any person is prohibited from acting as an attorney at the Quarter Sessions, unless such person be admitted an attorney, and inrolled, &c., and unless such person shall continue so entered upon the roll at the time of such his acting, &c.

Then the statute proceeds to enact, that every person who shall so act, not being admitted and inrolled *as aforesaid*, which, according to my interpretation, comprehends

the continuing so entered upon the roll, shall be liable to a penalty. *Exch. of Pleas, 1832.*

It appears that this gentleman had been admitted and inrolled as an attorney, but that during the years 1815 and 1816 he did not take out a certificate.

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Now the 37 *Geo. 3*, c. 90, s. 31, enacts, that if a person neglects to obtain a certificate, &c., he shall be incapable of practising; and the admission, entry, inrolment, or register, &c., shall be from thenceforth null and void.

By not taking out his certificate, therefore, this gentleman's inrolment became and was null and void. He, therefore, did not continue inrolled as aforesaid; and, not continuing inrolled as aforesaid, and being proved to have practised, he becomes liable to the penalties in question.

BAYLEY, B.—I entertain no doubt in this case. The section in the 22 *Geo. 2*, enacts, that no person shall practise unless admitted and inrolled, and unless he continue so inrolled at the time of his practising: and immediately following is the provision for a penalty upon every person who shall so act—"not being admitted and inrolled as aforesaid," that is, as it seems to me, not only having been admitted and inrolled, but continuing to be so inrolled.

Then comes the 37 *Geo. 3*, by which the admission and inrolment is rendered null and void if the party neglect to take out a certificate for a year.

The admittance and inrolment of this person being null and void, this becomes the case of an attorney practising who has not been admitted, and who has not been inrolled.

The rest of the Court concurring, the rule was

Refused.

Exch. of Pleas,
1832.

— v. PHILLIPS.

The Court will only grant a new trial when the verdict is under 20*l.*, where they can grant it without costs.

Where a tender of 12*l.* 10*s.* was pleaded, and found for the defendant, with a verdict for 19*l.* 10*s.* for the plaintiff on *non-assumpsit* pleaded to the rest of the demand, the Court refused to hear a motion for a new trial, *as against evidence.*

ASSUMPSIT. Pleas—Non assumpsit, and a tender of 12*l.* 10*s.*

At the trial before *Vaughan*, B., at the last Assizes for the county of *Leicester*, the Jury found for the defendant, on the tender; and for the plaintiff on the *non-assumpsit*, with 19*l.* 10*s.* damages, in addition to the 12*l.* 10*s.*

Adams, Serjt., proposed to move for a new trial, as on a verdict contrary to evidence; and he endeavoured to make out, that, in effect, the verdict was for 30*l.*, and said, that the cause was not within the rule as to verdicts under 20*l.*

Sed, per Curiam—You are only liable to pay 19*l.* 10*s.* by this verdict. The principle of the rule is, that, if there be no misdirection, the party would have to pay costs; and that would not be worth while in cases under 20*l.*

The Courts make a rule not to grant a new trial when the verdict is for less than 20*l.*, unless in a case where they can grant it without costs.

Rule refused.

JOHNSON v. ROUSE.

The old practice as to what was requisite to be stated in the affidavit on moving for a *distringas* on a *venire*, is applicable to the new process by writ of *summons*.

MANSEL applied for leave to issue a *distringas* after a writ of *summons* which had not been personally served. The affidavit on which this application was made, did not set forth the facts required to be stated in the affidavit, to ground a motion for a *distringas* upon a *venire*, according to the rule of practice established in *Pitt v. Eldred* (a), and adhered to in subsequent cases.

(a) 1 C. & J. 147.

BAYLEY, B.—The affidavit is defective. The rules Exch. of Pleas, 1833. which have been acted upon by this Court in granting a *distringas* upon the writ of *venire*, are properly applicable to the new writ of *summons*; and as this affidavit does not state the necessary facts required according to the rule laid down in *Pitt v. Eldred* it is insufficient.

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v.
ROUSE.

Rule refused.

STREET v. Lord ALVANLEY.

GODSON moved for leave to issue a *distringas* on a writ of summons, on an affidavit which did not state that the party attempting to serve the writ had, when he last called at the defendant's residence for the purpose of serving it, left a copy of it with the person he there saw.

It is necessary, on moving for a *distringas*, on affidavits of ineffectual attempts to serve the defendant at his dwelling-house with a writ of summons, to shew that the party attempting to make the service left a copy of the writ at the dwelling-house.

BAYLEY, B.—It is proper, in these cases, always to leave a copy of the process. Where the person who goes to serve it has an opportunity of giving the party whom he sees, and by that means the defendant also, the best notice of the object of his visit, and of the proceedings against him, by leaving a copy of the process, we ought not to be satisfied with notice of an inferior description.

Rule refused.

Lord LYNTHURST, C. B., on a subsequent day, in the case of *Forster v. Williams*, laid down the same rule.

Exch. of Pleas,
1832.

WARD'S Bail.

A notice that the bail has resided "within" the last six months at the place mentioned therein, is sufficient, when accompanied by an affidavit stating that the bail has resided there "for" the last six months, agreeably to the form prescribed by Rule 3 of T. T. 1 Will. 4.

A NOTICE of bail stated, that he had resided at the place mentioned in the notice "within" the last six months. This was accompanied by an affidavit, which stated, that he had resided there "for" the last six months.

Butt objected that Rule 2, T. T. 1 Will. 4, required that the notice of bail should set forth that the bail have resided at the place mentioned during the whole of the last six months.

Comyn, contra.—In *Fenton v. Warre* (a), *Bayley, B.*, held, that it was not necessary to make that statement in express terms. He admitted that the affidavit ought to state a residence for the last six months, according to the form prescribed in Rule 3, which had, in that case, been strictly followed; and he contended, that, at all events, as the notice had been accompanied by an affidavit, stating the fact of a residence "for" the last six months, the defect was supplied.

Butt said, as to *Fenton v. Warre*, that *Vaughan, B.*, had ruled otherwise; and that the practice of the *K. B.* in this respect was in future to prevail in the *Exchequer*.

GURNEY, B.—To satisfy the intention of this rule, I think the notice ought to state that the bail has resided there all the six months; because the rule further requires, that, where there has been more than one residence during that period, the notice shall specify all the streets or places in which he has resided at any time within the last six months. If the present notice were held sufficient,

(a) 2 Cr. & Jerv. 54.

bail might justify, though he had gone to reside in this place only a day or two before, as that would be residing within the last six months.

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1832.

WARD'S Bail.

Upon the latter part of *Comyn's* argument,

GURNEY, B., after consulting the Court, said—We think that as the notice was accompanied by an affidavit, stating that he had resided during the whole six months, it is sufficient.

CHANDLER v. BROUGHTON.

TRESPASS for driving a gig against the church in *Langham Place*.

At the trial before *Bayley, B.*, at the *Middlesex* Sittings after last *Trinity* Term, it appeared that the defendant was sitting by his servant, who drove the gig, and the horse ran away with them, and did the mischief in question.

It was objected that the action should have been brought in case; the learned Baron reserved the point; and the plaintiff had a verdict.

Where the defendant was sitting by his servant, who was driving him in a gig, and the horse ran away, and an immediate injury was done to the plaintiff's property:—*Held*, that the action was well brought in *trespass*.

Harrison now moved, by leave of the learned Baron, to enter a nonsuit.

[*Bayley, B.*—Is there any case which militates against this position; that if the owner is in the carriage, sitting by the driver, the act of driving by the servant is the act of the master? The reason is, that the master has the immediate control over the servant.]

The case of a pilot steering a ship is contrary.

[*Bayley, B.*—The pilot is independent of the master, and therefore that is an exception to the general rule.]

Esch. of Pleas,
1832.

CHANDLER
v.
BROUGHTON.

BAYLEY, B.—The accident arose from driving the horse in single harness. The point I left to the Jury was, whether he was a fit horse to drive in single harness.

The rule is this: if master and servant are sitting together, and the servant is driving the master, the act of the servant is the act of the master, and the trespass of the servant is the trespass of the master.

Here the act is immediately injurious to the plaintiff, and the master was present.

I think that where the master is sitting by the side of his servant, and the servant does an act immediately injurious to the plaintiff, an action of trespass is the proper remedy.

The rest of the Court concurred, and the rule was

Refused.

EVANS v. WILLIAMS.

Defendant and his surety signed a promissory note. Defendant was afterwards discharged under the Insolvent Act. The payee applied to the surety for payment, whereupon the defendant, to prevent the surety being sued, joined him in a new note:—*Held*, in an action by the payee, that he could not recover on this note against the defendant, as it was a new contract for the old debt, though

ASSUMPSIT on a promissory note drawn by the defendant and one *Edwards*.

Pleas—General issue, and discharge under the Insolvent Act.

At the trial before *Alderson, J.*, at the last Summer Assizes for the county of *Carmarthen*, it appeared that the defendant, and *Edwards* as his surety, had formerly given a promissory note, to secure to the plaintiff the payment of a sum of money due for sheep sold to the defendant by the plaintiff. The defendant took the benefit of the Insolvent Debtors' Act, 7 *Geo. 4*, c. 57, and was discharged from the debt. Afterwards, the plaintiff applied to *Edwards* for the amount of the note; and, to prevent proceedings against *Edwards*, the note mentioned in the declaration was given by the defendant to *Edwards*, for the new consideration of forbearance to the surety was added.

amount of the old note, with interest and charges. Upon these facts, the learned Judge nonsuited the plaintiff, but gave him leave to move to enter a verdict for the amount of the note.

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1832.

EVANS
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John Evans now moved accordingly.—There was a new consideration of forbearance. [*Bayley*, B.—It is a new consideration for a promise to pay the old debt. Lord *Lyndhurst*, C. B.—The defendant owed a debt; this is a new contract to secure that old debt.] The 7 *Geo. 4*, c. 57, s. 61, applies only to cases where the old debt is the sole consideration for the new promise. Before that act passed, a *cognovit* given by an insolvent, after his discharge, on proceedings commenced before, constituted a new promise, upon which he became liable, notwithstanding his discharge. *Sweeney v. Sharp* (a). The 61st section of this act was introduced to remedy this evil; but does not apply where there is a distinct consideration for the defendant's promise, independent of the original debt, as in the present case. Here the old debt of the defendant was discharged by the act; yet *Edwards* still remained liable to the plaintiff. The second note was given, not as a new contract or security for the extinguished debt of the defendant, but as a security for the subsisting debt of *Edwards*. It was a contract to pay the debt of *Edwards*, in consideration of the plaintiff's forbearance to sue him. It is clear, that such a contract would be valid, if made by any third party; and, under the circumstances of this case, the act does not protect the defendant.

Lord *LYNDHURST*, C. B.—I think that the nonsuit was right. The defendant executes a fresh note, including the same sum of money. That note was for the same debt or sum of money for which the defendant was liable before. The 7 *Geo. 4*, c. 57, s. 61, enacts, that no action

(a) 4 Bing. 37.

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shall be brought for any such debt or sum of money, or upon any new contract or security for payment thereof. Now, is not this a new contract for the same debt or sum of money? The only new ingredient is an additional consideration thrown in.

BAYLEY, B.—I am of the same opinion. It has been urged, that the defendant, after his discharge, was in the same situation as any third person. I think that he stands in a different situation, and that the act of Parliament prevents him from incurring this liability in the manner in which another person might have done.

By the act, the future effects of the insolvent may be distributed amongst his creditors. At the period when the note was given, those future effects were liable. The legislature, seeing the condition in which the act places the insolvent in this respect, make a provision, which puts it out of his power to subject himself to the old debt, and makes him not liable upon a new contract for the old debt. Now, is not this a new contract for the old debt? It is said that the old debt was discharged. But *Edwards* remained liable to the old debt, and the security is given for the old debt; for, if the property or future effects of the insolvent should yield 20*s.* in the pound, that would go in exoneration of the note; and it is clear, that the payee of the note could not be entitled to satisfaction from both. That shews clearly that the note was given for the old debt; and I am of opinion, that, under the provisions of the act of Parliament, this defendant is not liable upon a new contract to pay that old debt.

BOLLAND, B.—The case is within both the mischief and the letter of the act. *Williams* clearly came forward to secure the same debt.

GURNEY, B., concurred, and the rule was

Refused.

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1832.

GODDARD v. HODGES.

ASSUMPSIT for money paid. Plea—general issue.

At the trial before Lord *Lyndhurst*, C. B., at the *London* Sittings after last *Trinity* Term, it appeared that the defendant was chairman of the committee of a company for building a bridge over the *Thames*. The plaintiff was the solicitor to the undertaking, and brought this action to recover the amount of advertisements in the newspapers, and of his expenses in a journey to *Chester*, taken by him for the purposes of the undertaking.

A witness of the name of *Fall* was called on the part of the defendant, who proved that the plaintiff called upon him about taking shares. Upon that occasion *Fall* told the plaintiff that he had no money, and must leave such undertakings to more opulent men. Plaintiff then said, that as solicitor to the company he could not take shares himself, but if *Fall* would allow him to use his name, he would pay the deposit and every thing required. The plaintiff also said, that he expected to be continued solicitor to the concern. *Fall* consented to allow his name to be used, and, in consequence of this agreement, registered his name as a shareholder, and the plaintiff afterwards brought him a receipt for ten shares. *Fall* was never called upon at any time to pay any thing in respect of these shares.

He stated, on cross-examination, that he had never communicated the circumstance to any body, but he thought that some of the committee suspected it.

It appeared that a sum of 200*l.* had been paid on account, which covered all that part of the demand which had accrued before *Fall's* name was registered as a shareholder.

The Jury, in answer to the questions left to them by the learned Judge, said that they believed *Fall*, and that he held the shares for the plaintiff.

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A. B., at the request of the plaintiff, became the holder of shares, for the benefit of the plaintiff, in a company to which the plaintiff was solicitor. The plaintiff paid the deposits and all expenses on the shares. In an action by him against a member of the company, for money laid out for the use of the company, in advertising, and in journeys:—*Held*, that the plaintiff could not recover, as being the real (though *A. B.* was the ostensible) partner.

A general payment must be applied to a prior legal, and not to a subsequent equitable, demand.

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A verdict was then taken for 94*l.* 4*s.*, with leave to move to enter a verdict for the defendant.

Goulburn, Serjt., in this term moved for a rule *nisi* accordingly. He cited *Holmes v. Higgins* (a), and *Milburn v. Codd* (b), and contended that this case was similar in principle to those cases, and that the plaintiff could not sue, he being virtually and substantially a partner; and that he could not be allowed to do by another what he could not do himself.

Lord LYNTHURST, C. B., observed that the point was, that *Fall* was a trustee for *Goddard*.

BAYLEY, B., inquired whether the debt was incurred before the plaintiff applied to *Fall* to take the shares; and was informed that it was incurred long before.

Rule *nisi* granted.

Holt and *Hoggins* shewed cause.—*Goddard* never was a partner in fact. An agreement between him and the other members would be necessary to make him a partner, as between him and those other members.

In *Bray v. Fromont* (c), it was held that a stranger could not be imposed on a partnership body without their consent. [Lord *Lyndhurst*, C. B.—If *Fall* was acting merely as *Goddard's* agent, would not *Goddard* be liable for the debts of the concern, equally with the other members. If so, he is suing himself in this action.] He is answerable to the public, but he is not answerable to the company; as between him and the company, he is not a partner, for he could not be imposed on the company as a partner without their assent. [*Bayley*, B.—From what

(a) 1 B. & C. 74; 2 Dowl. & R. 238, S. C.
196, S. C. (c) Mad. & Geld. 5.
(b) 7 B. & C. 419; 1 Man. & R.

the plaintiff said, it seems that any body might be a member except the solicitor. The solicitor, in fraud of that arrangement, gets his money introduced into the concern, and gets all the benefits of it; is it not just that he should contribute to pay the debts? I quite agree that his fraud may deprive him of the advantages, but can it take away his liabilities? Suppose the partnership very profitable, and that *Goddard* had, through the agency of *Fall*, participated in the profits to a large amount; and suppose that *Fall* were a bankrupt, and the company were sued, and obliged to pay the debts of the concern, would not *Goddard* be liable to the other partners for contribution? Would not the other partners have a right to say, that, by the fraudulent (a) use of *Fall's* name, he has shared profits, and should, therefore, contribute to the losses? If *A.*, *B.*, and *C.* are partners, and *C.* makes a sub-contract with *D.*, *D.* would not be liable as a partner. *Coope v. Eyre* (b), *Saville v. Robertson* (c). [Lord *Lyndhurst*, C.B.—Would not *Goddard* be liable to contribute to the payment of this very debt? If so, how can he sue for it in a Court of law? It is money laid out by him for the benefit of the whole concern. *Fall* is his agent as well as trustee, and *Goddard* cannot be in a better situation than *Fall*, who acted for him as his agent. *Bayley*, B.—If *Goddard* had sued the whole concern for a debt contracted whilst *Fall* was the ostensible partner, could he have had execution against *Fall*? Or, suppose the present plaintiff recovered against *Hodges* the defendant, would not *Hodges* have an action for contribution

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(a) The Court explained that they did not mean any imputation of moral fraud. In point of fact there was no regulation to prevent the solicitor from holding shares. Probably the plaintiff's object in using *Fall's* name was,

that he might not be precluded from suing, according to the cases of *Holmes v. Higgins*, and *Milburn v. Codd*.

(b) 1 H. Bl. 37.

(c) 4 T. R. 725.

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against *Fall*, and would not *Fall* have a right to sue *Goddard* for his reimbursement? If *A.* and *B.* are partners in a ship, and *C.* buys a share, ostensibly for himself, but really for and with the money of *D.*, cannot all the fair contractors who have furnished provisions, &c., say, that they were furnished for the benefit of *D.*, and sue him, not as a sub-contractor, coming in under *C.*, but as if he, *D.*, had always been the real joint owner. Whether there were any fraud or not, the objection arises, when it appears that the plaintiff was the real partner, and *Fall* only the nominal one.] At all events, as part of the demand arose before *Fall's* name was registered, the plaintiff has a right of action. The 200*l.* was paid in generally on account, and there was no specific appropriation. [*Bayley, B.*—A partner would have no legal right until a settlement of the accounts. Could the payment be applied to a demand for which there was no legal right? Here is one sum for which the party is liable at law, and another sum for which he is not, but for which he may be liable in equity; and the demand for which he is liable at law is the earliest. I think that you must apply the payment to the demand for which the party was liable at law (*a*).]

Goulburn, Serjt., was stopped by the Court.

LORD LYNTHURST, C. B.—This is an action which has been brought by the plaintiff to recover a sum of money from the defendant, who is a partner in the company, for money laid out by the plaintiff at the desire of the company. There is no doubt but that this money was expended by the plaintiff; the question is, whether he is en-

(*a*) *Clayton's* case, 1 Merivale, 572; *Birch v. Tebbutt*, 2 Starkie, N. P. C. 74. In *Bosanquet v. Wray*, 6 Taunton, 597, it had been held, that a creditor might apply the payment to the discharge of a prior equitable demand, and sue

at law for the subsequent legal debt. See also, on this subject, *Cruikshanks v. Rose*, 2 M. & M. 100, 5 C. & P. 19, S. C.; *Wright v. Luining*, 3 B. & C. 165; 4 Dowl. & R. 783, S. C.

titled to recover it at law from the defendant, or, in other words, from the company. One point which was made is, that a part of this demand arose before those circumstances occurred, which the defendant contends have the effect of preventing the plaintiff's right of suing. But I am of opinion that this is no answer to the objection, because, I think, that under the circumstances the sum of 200*l.*, which has been paid on account, must be appropriated to the earlier items.

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On the remainder of the claim the question arises, whether the circumstances which occurred relating to the shares held by *Fall* for Mr. *Goddard*, were of such a nature as to deprive the latter of his right to sue.

Now, according to the evidence of *Fall*, it appears, that Mr. *Goddard* represented to him, that as solicitor to the company he could not hold shares; and, that he requested *Fall* to allow him to use his name, and he would pay the deposit. In consequence, *Fall's* name was registered, and the plaintiff afterwards brought him the receipts for ten shares; *Fall* then became ostensibly a member; but I consider that *Goddard* was really the member of this company, and that he stood in the situation of being liable for the debts of the concern.

Now the claim here is for a debt against the company, and, therefore, on the ordinary principle that one partner cannot recover against another at law, because he would be liable to contribute, I think that the plaintiff must fail in this action. I consider *Fall* as a mere agent, and the case is really the same as if *Goddard's* name was actually on the books of the company as a member.

BAYLEY, B.—It is a clear rule that one partner cannot sue another at law, until a balance is ascertained; and this is a proper and just rule, because where one partner sues another for what he has expended for the joint concern, he is endeavouring to enforce a claim for all which he has

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laid out, without at all considering whether other members of the partnership may not have laid out to the same extent. Whenever, therefore, it is made out that the relation of partnership exists, this objection is let in. The principle on which this objection of partnership prevails is, that the partner suing is bound jointly with the other partners to contribute to that and all the other partnership debts.

The question then is, is *Goddard* a partner or not in this company? In a concern of this nature there is no anxiety as to the situation of life of the subscribers, but every person who pays his money, and puts down his name, is readily admitted as a partner. *Goddard* either stood in a predicament by which he was excluded from becoming a partner by the nature of his situation, or he might think that his becoming a partner would render him liable to prejudices in respect of such situation, and, therefore, he did not think fit to be entered on the books as an *ostensible* partner; but is he or is he not a *real* partner? He applies to *Fall*. *Fall* says, I have no money, and that he leaves such things to more opulent persons. He asks *Fall* to allow him to use his name. The shares are taken in *Fall's* name, but *Goddard* pays all the calls. Now, as between *Fall* and *Goddard*, who would be entitled to any benefit? Would not every thing received by *Fall* on such shares be received by him to *Goddard's* use? If a loss happened, ought *Fall*, as between him and *Goddard*, to contribute to bear it? It would be most unjust if he were.

The substance is this, you shall be the nominal, but I will be the real partner. That is in effect the same, as far as relates to all other persons, as if the plaintiff had been the ostensible partner. The concealing that he was the real partner can make no difference either in justice or at law.

Now the demand was split into two; and, if any part had accrued before *Fall* became the nominal partner, I

should have thought that the objection ought not to prevail as to that part. But the general payment which has been made is an answer to the plaintiff's argument in this respect, because it ought to be applied to the earlier demand; and because it is the earlier part of the demand alone on which a legal claim can arise. If there be a legal debt, and a claim which would only become a legal debt on a settlement of the partnership accounts and a striking of a balance, we are bound to consider a general payment as applicable to the legal debt.

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The rest of the Court concurred.

Rule absolute to enter a nonsuit (a).

(a) The Court thought it reasonable that a nonsuit should be entered instead of a verdict for defendant, as prayed by the rule.

DOE d. CLARKE v. CLARKE.

IN ejectment, before Lord *Lyndhurst*, C. B., at the last Summer Assizes for the county of *Chester*; the only question was, whether *Richard Clarke*, the father of the lessor of the plaintiff, took an estate for life or in fee under the will of *Edward Clarke*, which was as follows:—

“ I, *Edward Clarke*, of *Hough*, in the county of *Chester*, clerk, revoking all former wills by me made, declare this to be my last will and testament. First, I give and bequeath, and charge such part of my property as may be

A testator, after charging such part of his property as might be necessary and adequate for the payment of his just debts, gave to his brother *R. C.* all that dwelling-house, &c., with all lands appertaining to the same, lately in the possession of *G. S. of W.*, or

his mortgagee, the said property lying and being in the township of *W.*, and also gave to *R. C.* all the share, right, and property of the *H.* estate, situate in the county of *Chester*, as left by his late father:—*Held*, that *R. C.* took a life estate only, in the premises in *W.*

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necessary and adequate for the payment of my just debts, after which I will as follows—I forgive and discharge my mother, *Elizabeth Clarke*, from the payment of all sums of money due from her to me of every kind and sort whatsoever, to enable her to apply the same for her own sole use and benefit. I also give and bequeath to my brother, *Charles Clarke*, the sum of one hundred guineas, with the watch left to me by my father. I likewise give and bequeath to my god-daughter, *Hester Clarke*, the sum of 100*l*. I also give and bequeath to my brother, *Richard Clarke*, *all that dwelling-house, malt-kiln, stable, and garden, with all lands appertaining to the same, lately in the possession of John Steele, of Wyburnbury, or his mortgage, the said property lying and being in the township of Wyburnbury.* I also give and bequeath to my brother, *Richard Clarke*, all the share, right, and property of the *Hogk* estate, situate in the county of *Chester*, as left by my late father. I also give and bequeath to the Reverend *Swinerton Clarke*, and my brother *Richard Clarke*, upon trust, all the money or property that may hereafter become due to me or my heirs, upon the death of my mother *Elizabeth Clarke*, (the same being part of the property secured to her for the term of her natural life, for or towards the payment of 100*l*. *per annum*, as an annuity granted her by the will of my late father), the same to be put out upon lawful interest, and applied for the sole use and benefit of the children of *Richard* and *Dorothy Clarke*, that now are or may hereafter be by them begotten, and the same to be paid to them severally and in equal parts as they shall marry or arrive at the age of twenty-one years. I hereby nominate *Elizabeth Clarke, Charles Clarke, and Richard Clarke*, executors of this my will. I likewise appoint *Elizabeth Clarke* residuary legatee to the same. In witness &c."

The learned Judge was of opinion that *Richard Clarke*

took an estate for life only in the premises in *Wybunbury* under this devise, and the plaintiff was nonsuited. Exch. of Pleas,
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d.
CLARKE
v.
CLARKE.

Jones, Serjt., now moved to set aside the nonsuit.—*Richard Clarke* took an estate in fee under the will of *Edward Clarke*. The testator charges such part of his property as was necessary to pay his debts. That charges his real property. [Lord *Lyndhurst*, C. B.—The individual taking the life estate is not charged. The estate is charged, and the individual takes it subject to the charge. Where the individual is charged, he must hold it for a time long enough to make him no loser; but where the estate is charged, the charge follows the estate, and each takes it subject to the charge.] The distinction is taken between a charge out of the rents and profits, and a charge on the estate. In *Doe v. Richards* (a), a devise of all the residue of the devisor's lands, hereditaments, goods, chattels, and personal estates, his legacies and funeral expenses being *thereout* paid, was held to pass a fee. [Lord *Lyndhurst*, C. B.—That imported being *thereout* paid by the devisee (b). *Bayley*, B.—Here, before the devisor gives the estate to the party claiming, he charges it. Now, would not that charge the estate in the hands of the heir-at-law? In *Doe v. Richards* the devise to the party comes first, and the testator then says—my legacies and funeral expenses being paid *thereout*; that must be by the devisee; he charges the estate into whatever hands it may come. If the devisee be personally charged with the payment of debts, or if the debts be charged on the quantum of estate given to the devisee, he takes the fee. *Doe v. Snelling* (c). To make a charge pass a fee, it must either charge the devisee or the lands in his hands. *Roe v. Dawe* (d). Now

(a) 3 T. R. 356.

(b) See Mr. Justice *Ashurst's* judgment, *ibid*; and see Lord *Ellenborough's* remarks on *Doe v. Ri-*

chards, in *Doe v. Snelling*, 5 East, 86.

(c) 5 East, 98.

(d) 3 M. & S. 518; and see 2 N. R. 343; 5 T. R. 558.

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in the present case this is not a charge on the devisee personally, nor is it a charge on the estate of the devisee. It is a charge on the estate whether in the hands of tenant for life, or in fee. Lord *Lyndhurst*, C. B.—It is a charge on the whole estate, not on the interest which the devisee takes.]

Jones, Serjt., then submitted, that the word *property* would pass the fee, but—

Per Curiam.—The word “property” is not used there to describe the quantum of the estate to be taken, but the local situation of the premises.

Rule refused.



DOE dem. WILLIAMS v. EVANS.

A codicil was duly executed and attested, and expressly referred to an unexecuted will on the same paper:—*Held*, that such execution gave effect to the will, and that it thereby became a good will of lands.

EJECTMENT by devisee against heir. At the trial at the last Summer Assizes for the county of *Carmarthen*, before *Alderson*, J., the following appeared to be the facts of the case. In *December*, 1829, the testator, *David Evans*, had requested a dissenting minister to prepare a will for him, which he did, containing, amongst other things, the devise of the property in question to the lessor of the plaintiff. A blank was left for the names of the executors. The will was written on the first page of a sheet of foolscap paper, which first page ended with the words, “In witness whereof I have hereunto set my hand and seal this 8th day of *December*, 1829;” and, on the second page, an attestation was written as follows—“Signed, sealed, and published by the within-named *David Evans*, as and for his last will and testament, in the presence of us, who, at his request, in his presence, and in the presence of each other,

have hereunto set and subscribed our names as witnesses hereto."

There was no signature or seal to this will, or signature of witnesses.

About a fortnight after this will had been prepared, the testator sent to the same minister, and said he wanted a codicil to his will. A codicil was accordingly prepared, and written on the same sheet of paper, lower down on the second page than the end of the above attestation. The codicil was as follows:—

"Codicil.—I, *David Evans*, make a codicil to the foregoing will, and thereby ordain, that my wife, *Ann Evans*, be entitled to the sum of 200*l.* of my property, in case she should marry (a). [no date].

Witness.

David Evans [no seal].

John Williams.

John Harry Logingoch.

William Howell."

This codicil was regularly signed by the testator, on the 30th *January*, 1829, in the presence of the three attesting witnesses. He said to the witnesses, before the paper was produced, that his will was in the desk. When brought out, he folded it up, so that the former parts of the paper could not be seen; and he said, this is my will, and something else, which the witness who deposed to these facts could not remember. On these facts, the learned Judge was of opinion, that the execution of the codicil was a good execution of the will; and the lessor of the plaintiff had a verdict.

Whitcombe now moved for a new trial, and stated the foregoing facts. The will was a nullity in its creation,

(a) By the former will, nothing was left to the wife in case of her second marriage.

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and cannot be made good by matter *ex post facto*. *Attorney-General v. Barnes* (a). It appears, from the instrument itself, that it is incomplete, inasmuch as the testator has not filled up the blank with the names of the executors, whom, it appears, he intended to appoint to execute it. [*Bayley, B.*—The execution of the codicil will have the effect of bringing down the will, and making it speak at the time of the codicil being executed, unless you can shew that he intended to execute the codicil only, and not to give effect to the will. *Carleton v. Griffin* (b) is in point.] That case is distinguishable from the present. In *Carleton v. Griffin*, there was not only a reference to the former part, but a reference to it as a subsisting instrument, by the words, “and this not to disannul any of the *former part* made by me 2nd of May, 1752;” and Lord *Mansfield* there says, “It is not stated to be a will or a codicil, but a sheet of paper written, &c. It is a *memorandum* to be *added* to it. But he does not call this a *codicil*. The publication of it is as a will. He takes up the paper, and says, ‘it is my will.’ And, certainly, he did not mean a *part* of it *only*, but the *whole* of it. And he desires them to attest it.” And *Dennison, J.*, in that case, relies on the testator calling it a memorandum, and not a codicil. Here the former instrument is called a will in the codicil; and it was proved that he gave instructions for a codicil, and he executes the codicil only.

BAYLEY, B.—I think that we ought not to grant a rule in this case, as we are clearly of opinion, on the authority of *Carleton v. Griffin*, that it could not be sustained. The party makes what he intended to be his will at some time or other, but he does not then make it his will; for, it was

(a) 2 Vernon, 597. In that case, *quare* whether the codicil was not upon a separate paper. The refer-

ence to *Lea v. Libb*, 3 Mod. 262, seems to favour this supposition.

(b) 1 Burrow, 549.

neither executed nor witnessed; and the question is, whether the codicil made at a subsequent time is to be confined to its operation as a codicil, or whether its execution was not also an execution of the will. The will was written on part of a sheet of foolscap paper, and the codicil was written on the same sheet. Now, if the codicil had not referred to the will, I should have thought that it did not set up that instrument; but, if the codicil do refer to the will, then I am of opinion that it does set it up. The language is, "Codicil—I, *David Evans*, make a codicil," which word implies an addition to a former instrument. It proceeds, "a codicil to the foregoing will, and thereby ordain that my wife, *Ann Evans*, be entitled to the sum of 200*l.* of my property, in case she should marry." Now, to this codicil there are three witnesses; and the testator, by executing this codicil, appears to me, at that time, in as plain terms as possible, to have set up not only the codicil, but the will. The only distinction between *Carleton v. Griffin* and the present case is, that in *Carleton v. Griffin* the first will was signed; here the first will was not signed. Signing a will of lands does not, however, make it an operative instrument. To give the will in that case operation, the Court must have thought that they were entitled to consider the execution and attestation of the codicil as giving effect not only to the codicil but to the will. The language of the codicil there was, "not to disannul any of the former part;" and, by the decision, it operated not only not to disannul, but to set up the former will. Now, I cannot say that I can distinguish that case from the present; and, independent of any authority, I should have thought that there was good reason to consider that the execution and attestation in this case applied to the whole of what was on the paper. The codicil, expressly referring to the will, shews that the intention of the testator was, that both instruments should be operative.

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BOLLAND, B.—The codicil sets up the will, and renders it as effective as if the testator wrote “I add this to what is written before, and now I set my hand to it.”

GURNEY, B., concurred. And the rule was

Refused.

JACKSON v. GODARD and Another.

Quære the effect of receiving the payment of a debt, which has been made the subject of a set-off, after such set-off has been pleaded, or notice thereof given with the plea of the general issue.

DEBT for goods sold—particulars, 3*l.* 18*s.*; plea, general issue, with notice of set-off—particulars 8*l.* 3*s.* 8*d.*

At the trial before *Bayley*, B., at the *Middlesex* Sittings after *Trinity* Term last, the following appeared to be the facts of the case.

On the 28th of *April*, *Godard* sued *Jackson* for work done, and gave particulars of his demand, which amounted to 8*l.* 3*s.* 8*d.* *Jackson* then declared against *Godard*, by the bye, (against whom he had a previous action pending in this Court), for 3*l.* 18*s.*, which was the declaration in the present action. To this *Godard* pleaded the general issue, and gave a notice of set-off for 8*l.* 3*s.* 8*d.*, which was the sum claimed as the demand in *Godard's* action against *Jackson*.

Jackson having obtained the particulars in *Godard's* action, took out a Judge's order to stay proceedings on payment of debt and costs. He then taxed the costs, and went with his attorney to *Godard's* attorney, and tendered to him the debt and taxed costs, amounting to 13*l.* 9*s.* 8*d.*, which he refused to accept, unless the 3*l.* 18*s.* was deducted. He subsequently received the money under protest, and gave the following receipt:—

“ In the Exchequer of Pleas.

Godard v. Jackson.—Received 21st *May*, 1832, of Mr. *Jackson*, by the payment of Mr. *Rushworth*, his attorney,

the sum of 13*l.* 9*s.* 8*d.*, the balance of the debt and costs in this action, hereby protesting against the receipt of 3*l.* 18*s.*, and offering to allow the same as a set-off against the defendant in this action.

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Wm. Lyde, plaintiff's attorney.

Balance of debt - £ 8 3 8

Costs - - - - 5 6 0

13 9 8"

Upon these facts the learned Baron was of opinion, that the plaintiff had no available demand at the time of the commencement of the action; and the plaintiff was nonsuited.

Mansel now moved to set aside the nonsuit, and for a new trial.—The statute of set-off is not compulsory, and, therefore, the plaintiff had a right to pay the debt he owed and to proceed in his action. The main question is, at what period of the cause is the account to be taken? If at the commencement of the action, the plaintiff had no right to sue. But the plaintiff has a right to have the account settled at the time of the trial. A notice of set-off is not to place a plaintiff in a different situation from a plea of set-off. Now, if the set-off had been pleaded in this case, the plaintiff might have shewn by a replication *puis darrein continuance*, that the matter of set-off had been done away with since the plea pleaded. There is a precedent to this effect in *Wentworth* (a). The replication would have been, that, after plea pleaded, the debt and costs had been satisfied.

BAYLEY, B.—On such a replication the question might arise, whether the payment had been accepted. Here, it was not the plaintiff in that cause, who accepted; it was

(a) 3 *Wentworth*, 162.

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the attorney, who had no authority to accept the whole. The defendant in that cause insisted on paying the whole, which he had no right to do. I thought, that, at the commencement of the present suit, the defendant had a good set-off, and the plaintiff had no available demand. It is not immaterial, however, that the payment was made to the attorney; and the person making the payment must have known that the attorney ought not to have received the whole.

Cur. adv. vult.

On a subsequent day, Lord LYNDHURST, C.B., delivered the judgment of the Court—

We think that there should be no rule in this case. It is unnecessary to give any opinion as to the effect of receiving payment of a debt after a set-off has been pleaded, inasmuch as we are of opinion that the manner of receiving it in the present case, with a qualification, prevents that question from arising.

Rule refused (*a*).

(*a*) See 2 Burr. 1230, and 2 Camp. 594, which were referred to in the course of the argument.

NICHOLSON v. PAGET.

A guarantie in the following words: "I hereby agree to be answerable for the payment of 50*l.* for *T. Lerigo*, in case *T. Lerigo* does not pay for the gin, &c. which he receives from you, and I will pay the amount."—*Held*, not a continuing guarantie.

ASSUMPSIT on the following guarantie.

"Sir—I hereby agree to be answerable for the payment of 50*l.* for *T. Lerigo*, in case *T. Lerigo* does not pay for the gin &c. which he receives from you, and I will pay the amount."

—*Held*, not a continuing guarantie.

At the trial before *Gurney, B.*, at the *London Sittings* in last *Trinity Term*, it appeared, that after giving the guarantie, goods to a large amount had been supplied by the plaintiffs to *T. Lerigo*, and that he had paid much more than 50*l.* for such goods, the ultimate balance being about 30*l.* The only question was, whether the guarantie was a continuing one. The plaintiff contended that it was, relying on *Mason v. Pritchard* (a), and *Merle v. Wells* (b); the defendant contended that it was not, relying on *Melville v. Hayden* (c). The learned Baron non-suited the plaintiffs, but gave them leave to move to enter a verdict for the amount.

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Jervis, having obtained a rule accordingly—

Lloyd now shewed cause.—A guarantie cannot be construed to be continuing, unless it appear clearly to have been the meaning of the parties to extend it beyond the first transaction. There must be something in the guarantie by which it may clearly and unequivocally appear that it was the intention of the parties that the guarantie should be a continuing one. *Melville v. Hayden* is a strong case in the defendant's favour, and must govern the present case. There the engagement was "to guarantee the payment of Mr. A. M. to the extent of 60*l.* at quarterly account, bill two months, for goods to be purchased by him of W. & D. Melville." Mr. Justice Bayley in that case, after remarking that the words "quarterly account" did not vary the case, said—"A party who takes a guarantie of this sort, should carefully provide that there are words in it expressive of its being a guarantie for goods to be furnished by him from time to time." *Davis v. Pritchard* was cited for the plaintiff at the trial. That case was said by the Court

(a) 12 East, 227.

(b) 2 Camp. 413.

(c) 3 B. & A. 593.

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in *Melville v. Hayden*, to go as far as possible. In that case, however, the words were “for any goods he hath or may supply.” In *Merle v. Wells*, and in *Bastow v. Bennett* (a), the word *any* occurred; and in the latter of these cases Lord *Ellenborough* laid peculiar stress upon that word.

One of the last cases on the subject is *Hargreave v. Smee* (b). [*Bayley, B.*—The Court there relied on the words, “according to the custom of the trade.”] In the present case there are no words which at all refer to any course of dealing from which an intention that the guarantie should be a continuing one can be inferred; on the contrary, the words “for the gin, &c.,” seem to stipulate for one delivery. [*Bayley, B.*—It may possibly mean for whatever gin.] It is difficult to say, that there is a plain and manifest intention expressed in this instrument that the guarantie should continue; and if not, it falls within the rule laid down by Mr. Justice *Bayley*, in deciding *Melville v. Hayden*.

Jervis and *Godson* for the plaintiffs.—The rule of construction is, that, if there is any ambiguity, it should be taken against the party executing the instrument. *Hargreave v. Smee* (c).

So in *Mason v. Pritchard* (d), the Court said, that “the words were to be taken as strongly against the party giving the guarantie as the sense of them would admit.” The construction ought to be liberal in favour of the person who parts with goods on the faith of such an instrument. In the present case the word “receives” imports a habit or course of receiving.

The guarantie may be divided into two sentences, the last being—“in case *T. Lerigo* does not pay for the gin

(a) 3 Camp. 220.

(b) 6 Bing. 244; 3 Moore & P.
573.

(c) 6 Bing. 248; 3 Moore & P.

582. Judgment of *Tindal, C. J.*

(d) 12 East, 228.

which he receives, I will pay the amount," that is, the amount of the gin. Then the first sentence would limit the responsibility to 50*l.*, by the words "I agree to be answerable for the payment of 50*l.* for *T. Lerigo*." The responsibility to that amount would continue until notice, according to the doctrine laid down by *Wood, B.*, at *Nisi Prius*, in *Mason v. Pritchard* (a).

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In *Simpson v. Manley* (b), the words were—"our relation, Mr. *Thomas Manley*, having intimated to us that he is about to make some purchases of goods from you, we beg to say that if you give him credit, we will be responsible that his payments shall be regularly made, to the extent of one thousand pounds, from this period to the 1st of *June*, 1831;" and it was thought too clear to admit of argument to the contrary, that the guarantie was a continuing one.

BAYLEY, B. (c)—In that case the limits were expressed. The distinctions between the cases on this subject are very nice; and it is desirable, as far as it is possible, to lay down a general rule. We will consider of our judgment.

Cur. adv. vult.

The judgment of the Court was now delivered by—

BAYLEY, B.—The question in this case was, whether the guarantie was a continuing guarantie, or whether it had terminated by the payment of 50*l.*? The language of the instrument is in these words—

"Sir—I hereby agree to be answerable for the payment of 50*l.* for *T. Lerigo*, in case *T. Lerigo* does not pay for the gin, &c., which he receives from you, and I will pay the amount."

(a) 2 Camp. 437.

(b) 2 C. & J. 12.

(c) Lord *Lyndhurst*, C. B., was sitting in equity.

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Now this is a contract of guarantie, which is a contract of a peculiar description; for it is not a contract which a party is entering into for the payment of his own debt, or on his own behalf; but it is a contract which he is entering into for a third person: and we think that it is the duty of the party who takes such a security to see that it is couched in such words as that the party so giving it may distinctly understand to what extent he is binding himself. The language of the first part of this guarantie is—"I hereby agree to be answerable for the payment of 50*l.* for *T. Lerigo*." Now, these words would *primâ facie* import that the party giving the guarantie would be answerable for the payment, by *T. Lerigo*, of 50*l.*, and no more. Then, is this engagement extended by the subsequent words?—"in case *T. Lerigo* does not pay for the gin, &c., which he receives from you, and I will pay the amount." Now these latter words do not profess to override any particular period of time. This guarantie, therefore, must either be applicable to an indefinite time and determinable by notice, or be confined to the payment of the first sum of 50*l.* that becomes due; and we think that it is not applicable to an indefinite time, but is limited to the payment of the first 50*l.*; and that it is not a continuing guarantie.

The case which comes nearest to the present is the case of *Melville v. Hayden*. There the words were—"I engage to guarantee the payment of Mr. *Amos Moulden*, to the extent of 60*l.*, at quarterly account, bill two months, for goods to be purchased by him of *William & David Melville*." That language was fully as strong as the language in the present case. There it was—"I engage to guarantee, &c., to the extent of 60*l.*;" here, it is—"I agree to be answerable for the payment of 50*l.*" The Court, however, in that case held, that as soon as *Moulden* had paid to the extent of 60*l.*, the guarantie was at an end. The distinction is, and must be, minute, between those cases, where the guarantie has been held to be a

continuing guarantie, and those where it has been held to be limited. In *Mason v. Pritchard* the words are—"for any goods he hath or may supply *W. P.* with, to the amount of 100*l.*" The meaning seems to be, not to limit the liability to the extent of the payment of 100*l.*, so that such liability should not continue after the time when that sum should have been paid, but that the party giving the guarantie was willing, if not called on for more, to be answerable to that extent at any time. In *Merle v. Wells*, the words were—"for any debt he may contract for his business as a jeweller, not exceeding 100*l.*, after this date." These words point out the extent to which the surety is willing to go in paying debts contracted for goods for the carrying on of the business. *Hargreave v. Smee* is the last case on the subject. The words were—"guarantee the payment of goods, to be delivered in umbrellas and parasols, to *J.* and *E. A. S.*, according to the custom of their trading with you, in the sum of 200*l.*" The meaning is not, if you will supply to the extent, but, I will be answerable to the extent; and the extent of 200*l.* is not to point out the extent to which the goods should be from time to time supplied under that guarantie, but to point out the extent to which the surety will be willing to pay on this, as a continuing guarantie.

In the present case the fair meaning of the words in the first part of this guarantie—"I will be answerable for the payment of 50*l.* for *Lerigo*," is, that I will be answerable that *Lerigo* shall pay you to the extent of 50*l.* for goods to be furnished. On the facts of the case, this might probably be the understanding between the parties. Here is a young man starting in business; you may supply him with goods to the amount of 50*l.*, for his paying which I am answerable; afterwards, you can see how he goes on, and whether you approve of his mode of carrying on his business, and of his payments; and you will continue to supply him or not, accordingly.

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The subsequent part of the guarantie does not extend this responsibility; it limits and qualifies the previous part of the contract.

This decision will be attended with beneficial consequences. It is not unreasonable to expect, from a party who is furnishing goods on the faith of a guarantie, that he will take the guarantie in terms which shall plainly and intelligibly point out to the party giving the guarantie the extent to which he expects that the liability is to be carried. The guarantie in this case does not clearly and intelligibly point out to the party giving it to what extent his liability is to be carried. We are, therefore, of opinion, that the rule for entering a nonsuit should be discharged.

Rule discharged.

FREAME v. MITFORD.

Where a married woman has been arrested, the Court will discharge her on filing common bail, or order the bail bond to be given up to be cancelled, if the coverture be clearly established, unless she has used deceit before or at the time of obtaining the credit.

WILSON had obtained a rule to deliver up the bail bond to be cancelled, on the ground of the defendant being a married woman. It appeared, upon affidavits on the part of the plaintiffs, that the defendant, in *May*, 1830, went with her daughter, a lady in a respectable situation in life at *Worcester*, to the shop of the plaintiffs, tradesmen in *Worcester*, and ordered some furniture for a house at *Great Malvern*. The plaintiffs did not think it necessary to make inquiries, as they knew the respectability of the daughter; and supplied goods to the amount of 57*l*. They supposed the defendant to be a widow, and would not have trusted her, had they known of her coverture. It was further sworn, that she was understood to be a widow by the numerous tradesmen with whom she dealt. On being applied to for payment of the plaintiff's account, the defendant wrote a letter, engaging to pay 30*l*.

or 25*l.* in two months, if the plaintiffs would draw upon her for that amount; and they drew a bill accordingly, which she accepted. She had dealings with another tradesman at *Worcester* from *June*, 1829, and, of her own accord, had given him two bills, to which she was a party, in payment for goods furnished by him.

It was also sworn, that the plaintiffs had been informed, and believed, that the defendant had, for many years, lived separate from her husband, and that she had a separate and distinct income.

Whitmore shewed cause.—The Courts will not interfere in a summary way, where there has been any fraud practised by the defendant, holding herself out as an unmarried woman. *Partridge v. Clarke* (a). In *Jones v. Lewis* (b), and *Prichard v. Cowlam* (c), it was held, that the mere issuing a bill of exchange by a married woman was a holding herself out to the world as a single woman so as to preclude her from obtaining relief from the Court in this summary way. [*Bayley*, B.—The bill and the letter, in this case, were subsequent to the contracting the debt. In *Collins v. Rowed* (d), “The Court said that it was not now the practice to refuse to discharge a married woman, merely because her coverture was not notorious, and the plaintiff had trusted her as a *feme sole*; that if a woman deceives the plaintiff with respect to her coverture by a falsehood, the Court will not discharge her; but that, in the present case, as the defendant had not used any deceit, by representing herself as a *feme sole*, she was entitled to be discharged.”] In that case there was no bill of exchange given. In the present, the letter, offering a bill, was written before the taking the bill, upon which, as well as for the remainder of the goods, the plaintiffs are

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(a) 5 T. R. 194; and see *Pearson v. Munden*, 2 Black. Rep. 903.
(b) 7 Taunt. 55.

(c) 2 Marshall, 40.
(d) 1 New Rep. 54.

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now suing. [*Bayley, B.*—You, who knew the circumstances, do not shew that any such letter was written, or that any bill was given, before the goods were supplied. The bill was merely a security for the old debt, for which the plaintiffs had no remedy against the defendant. It did not cause the plaintiffs to give the original credit.] The plaintiffs might, by the giving of the bill, be deluded, and prevented from using so much diligence as they would otherwise have done.

Wilson, contrà.—The case falls within the rule laid down in *Collins v. Rowed. Hilden v. Sanders*, cited in that case by *Onslow, Serjt.*, was a stronger case than the present; for, it is difficult to say that the defendant there had not taken an active part in representing herself as a single woman. In the present case, the defendant has never done any act to mislead the plaintiffs, or to hold herself out to them as a single woman. The bill was not given until long after the credit was obtained, and upon an urgent request by the plaintiffs for their money.

BAYLEY, B.—I consider this as a hard case; but it is very desirable, in matters of this description, that we should act on certain grounds. In this instance there is a positive affidavit of the marriage, which is not, in any respect, put in doubt by any affidavit on the part of the plaintiffs; and if the marriage be established, the plaintiffs would be defeated at the trial; and we ought not, therefore, to give them any encouragement to proceed, and thereby put both parties to great additional expense. I take the rule to be this: if the affidavits raise any degree of doubt as to the marriage, the Courts will not interfere in a summary way. Another rule is, that if it is made out affirmatively, that the party was deceived into giving the credit by the defendant's representations, the Courts will not discharge her upon motion. In one instance the mar-

riage was notorious; but the woman had said, I have got an act of Parliament for a divorce. In another case, the defendant had represented herself as having separate property. In the present case it does not appear, that at the time when the debt was contracted, any act had been done by the defendant to induce the plaintiff to believe that she was a single woman. It is true, that, at a subsequent period, she signs a bill of exchange, an instrument by which a married woman cannot bind herself; and if any new credit had been obtained thereby, I might have come to a different conclusion from that to which I have arrived; but, it appears, that the debt in question was long antecedent to the signing the bill of exchange. It appears to me, therefore, that the case in the *New Reports* is applicable. There the plaintiff did not know that the defendant was a married woman at the time the debt was contracted; she appeared as a *feme sole*, and, since the contracting of the debt, she had made promises to pay, and offered another person's security.

Now that state of facts corresponds exactly with the circumstances which occurred in the present case, until the time of the contracting the debt.

It is hard: but tradesmen, in cases of this description, may generally blame themselves. Here the woman was accompanied to the shop of the plaintiffs by her daughter, the wife of a respectable clergyman. The plaintiffs might have made inquiries, and have ascertained, before they supplied the goods, whether she was in such a situation as to be likely to pay for them. Here, then, there is no doubt as to the fact of the marriage; and there does not appear to have been any deceit, except so far as the plaintiffs may have been deceived by the circumstances under which the defendant was living, in the same manner as in the case of *Collins v. Rowed*. I think that this rule ought to be made absolute.

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VAUGHAN, B.—It is of more importance that the rules, in matters of this description, should be clear, than what the rules are. I take the rule to be, that the Courts will interfere in this summary way, if the coverture be clearly established, unless the plaintiff have been deceived. In this case there is no doubt as to the coverture; with respect to the other point, there has been no direct false representation, or holding herself out to be a single woman; and, therefore, I am of opinion that the defendant is entitled to be relieved.

BOLLAND, B., and GURNEY, B., concurred; and the rule was made

Absolute.

HUCKER v. GORDON.

It is sufficient if the sheriff take one pledge on a replevin for distraining cattle *damage feasant*.

A count against the sheriff for not restoring the goods, is bad.

Counts against the sheriff for taking insufficient pledges in a replevin of cattle distrained *damage feasant*, should shew a *retorno habendo*.

ACTION on the case. The first count stated, that the plaintiff heretofore, to wit, on the 1st *November*, 1830, in a certain close of the plaintiff, situate and being at *Ilchester*, in the county of *Somerset*, took and distrained the cattle, goods, and chattels, to wit, thirty ewe sheep of one *J. F. Reeves*, of great value, to wit, of the value of 50*L.*, and in the said close of the said plaintiff then and there being, and doing damage there to the plaintiff, as a distress for the said damage. And the said plaintiff then and there led and drove the same out of the said close to a certain common pound in the parish in which the said close of the plaintiff was situate, and then and there impounded the same, and kept the same impounded for a long space of time for the cause aforesaid, according to the laws and customs of this realm, until the defendant, then being sheriff of the said county of *Somerset*, afterwards, to wit, on &c., and within his bailiwick as such sheriff, that is to say, at &c., on the complaint of the said *J. F. Reeves*, made to

him, the defendant, so then being such sheriff, against the plaintiff in that behalf, and under colour of his office of sheriff as aforesaid, caused the said cattle, goods and chattels to be replevied and delivered to the said *J. F. R.*, and then and there made deliverance of the said distress to the said *J. F. R.*, to wit, at &c. And the plaintiff averred, that at the then next county court of the said sheriff, holden at *Ilchester* aforesaid, in and for the county of *Somerset*, before the then suitors of the said court, to wit, *J. Denn* and *Richard Fenn*, the said *J. F. R.* did appear, and then and there in the same court, without the writ of our said Lord the King, levied his plaint against the said plaintiff, for wrongfully taking and unjustly detaining the said cattle, goods and chattels; and that afterwards, to wit, on &c., at &c., the plaintiff duly appeared in and before the said court to answer the said *J. F. R.* in the plea of his said plaint; and such proceedings were thereupon had in the said plea, that afterwards, to wit, at the next county court of the defendant as such sheriff, holden at &c., in and for &c., on &c., before the then suitors of the said court, the said *J. F. R.* did not duly prosecute his suit, and it was then and there duly considered in and by the last-mentioned court, that the said *J. F. R.* should take nothing by his said plaint, but that he and his pledges to prosecute should be in mercy &c., and that the said plaintiff should have a return of the said cattle &c., as by the remembrance and proceedings thereof still remaining in the said court more fully and at large appears. And, although it was the duty of the defendant, as such sheriff, before his making deliverance of the said distress to the said *J. F. R.*, in pursuance of the statute in such case made and provided, to take from the said *J. F. R.* and two responsible persons, a bond in double the value of the said cattle &c. so distrained, conditioned for the prosecuting the suit of replevin of the said *J. F. R.* for the taking of the said cattle &c., with effect and without delay, and for

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duly returning the cattle &c. so distrained, in case a return should be awarded. Nevertheless, the defendant so being such sheriff, not regarding his duty in that behalf, but contriving &c. did not nor would before his making deliverance of the said distress to the said *J. F. R.*, take from the said *J. F. R.* and two responsible persons as sureties as aforesaid, such a bond as aforesaid, but wrongfully and injuriously wholly omitted and neglected so to do, to wit, at &c. And the plaintiff further avers that he hath not as yet obtained a return of the said cattle &c., so distrained as aforesaid, or any part thereof, and the said damage is still unsatisfied to the plaintiff, nor hath the said *J. F. R.* hitherto answered the said plaintiff for the value of the said cattle &c. so distrained; and by reason of the premises, the plaintiff hath been and is wholly deprived of the said cattle &c. so distrained as aforesaid, and of the benefit of the said distress, and of the means of satisfying the said damage, and his costs and charges by him expended in and about the endeavouring to obtain satisfaction thereof, and a return of the said cattle, to wit, at &c. (The second count was similar, but rather more general, omitting the mention of the impounding, and of *Reeves* appearing and levying his plaint &c., and stating, instead, generally, that *Reeves* did not appear and prosecute with effect his suit by him before then commenced &c.) (The third count proceeded as in the first count to the end of the averment of the sheriff's duty, and then alleged for breach, as follows—) that the defendant, so being such sheriff as aforesaid, not regarding his duty in that behalf, but contriving &c., did not nor would, before making deliverance of the last-mentioned distress to the said *J. F. R.*, take from the said *J. F. R.* and two responsible persons as sureties, such a bond as aforesaid, conditioned as aforesaid, but wrongfully and injuriously wholly omitted and neglected so to do, and on the contrary thereof the defendant wrongfully and unjustly before the replevying and

delivering of the last-mentioned cattle, to wit, on &c., at &c.; did take in the name of him the defendant, as such sheriff of the said *J. F. R.*, and one other person, to wit, *R. Jones*, a certain bond conditioned for the prosecuting the said suit of the said *J. F. R.* with effect and without delay, and for duly returning the last-mentioned cattle &c., so distrained as aforesaid, in case a return thereof should be awarded as a bond taken in pursuance of the said statute, nevertheless, the said plaintiff saith, that the said *R. Jones* so taken as surety at the time of his becoming pledge and surety in that behalf, was not a good, able, or responsible surety for the prosecuting the said suit with effect and without delay, or for duly returning the said cattle &c. so distrained as aforesaid, in case a return thereof should be adjudged; but the said *R. Jones*, at the time of his becoming such surety as aforesaid, was, and ever since hath been, and still is, wholly insufficient for that purpose, nor have the last-mentioned cattle &c., as yet been returned &c. (Damage stated as in first count.) (The fourth count, after reciting, as in the first count, to the end of the *non pros*, went on to allege) that although it was the duty of the defendant as such sheriff, before his making deliverance of the last-mentioned distress to the said *J. F. R.*, in pursuance of the statute in such case made and provided, to take from the said *J. F. R.* pledges for the prosecuting of the said suit, and for duly returning the said cattle &c., in a certain bond conditioned for the prosecuting of the said suit, and for duly returning the said cattle &c.; and, although the defendant before the replevying and delivering of the last-mentioned cattle &c., to wit, on &c., at &c., did take in the name of him, the defendant, as such sheriff, of the said *J. F. R.* and a certain other person, to wit, *R. Jones*, a certain bond conditioned for the pursuing of the said suit, and for duly returning the last-mentioned cattle &c., in case a return should be awarded; and although the said *J. F. R.* did not make a return of the last-mentioned cattle

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&c., according to the form and effect of the condition of the said writing obligatory, but hitherto wholly neglected and refused so to do, to wit, at &c., whereby the said writing obligatory became forfeited to the defendant, as being sheriff of the said county. And the plaintiff further avers, that he, the said plaintiff, did afterwards, to wit, in &c., at &c., request the defendant to assign the benefit of the said writing obligatory to him, the said plaintiff, and permit him, the said plaintiff, to sue thereon in the name of him, the said plaintiff, and for his, the said plaintiff's, own use and benefit; and, although he, the said plaintiff, was then and there willing, and then and there offered to pay to the defendant the costs payable to him in that behalf, yet the defendant, so being such sheriff, not regarding the duty of his said office as sheriff, nor the statute in such case made and provided, but contriving &c., did not nor would at the said time when he was so requested, assign to the plaintiff, as the defendant in the said action, the benefit of the said writing obligatory, and permit him, the said plaintiff, to sue thereupon in the name of him, the said plaintiff, and for his, the said plaintiff's, use and benefit, but on the contrary thereof then and there wholly refused, and hath from thence hitherto wholly neglected and refused so to do; and by means of the premises last aforesaid, the plaintiff hath been and is hindered and prevented from bringing any action or actions on the said writing obligatory, and hath been and is deprived of the means of recovering the said damages, and of obtaining a return of the last-mentioned cattle &c., to wit, at &c. (The fifth count, after reciting as in the first count to the end of the *non pros*, proceeded to allege) that the defendant, not regarding his duty &c., but contriving &c., did not nor would, nor did any of his bailiffs after the said award of the said return of the last-mentioned cattle &c., restore the last-mentioned cattle &c. to the said plaintiff, but on the contrary thereof the plaintiff avers, that he hath not obtained a return of the last-men-

tioned cattle &c. so distrained, and the last-mentioned damage hath not been satisfied to him the said plaintiff, nor hath the defendant nor any of his bailiffs hitherto answered the plaintiff for the price of the last-mentioned cattle &c., so distrained &c., by reason &c. (stating damage as in first count), to plaintiff's damage of 200*l.* &c.

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The defendant pleaded to the first, third, and last counts, *actio non*, because, before the exhibiting of the bill of the plaintiff in this behalf, to wit, on &c., the said several complaints in those several counts mentioned, at the instance of the said *J. F. R.*, were duly removed from and out of the county court of the said sheriff of the said county, into the court of our said Lord the King, before the King himself at *Westminster*, by virtue of his Majesty's several writs of *re. fa. lo.* before then duly sued and prosecuted out of the court of our said Lord the King of his *Chancery*, at *Westminster* aforesaid, returnable respectively before our said Lord the King, on &c., wheresoever &c., and that the said *J. F. R.*, before and at the time of the said several removals of the said several complaints in those counts mentioned, and from thence continually to the time of the exhibiting of the said bill of the said plaintiff in this behalf, hath duly prosecuted and still is duly prosecuting his said several suits between the said *J. F. R.* and the now plaintiff, of and in the said several takings and detainings; and that the said several suits at the time of the exhibiting of the said bill, were and still are pending in the said court of our said Lord the King &c., and not in any way ended or determined; concluding with a verification &c.

The defendant pleaded to the second count *actio non*, because, before the exhibiting of the bill of the plaintiff against the defendant at the county court of the said sheriff, holden at *Ilchester*, in and for the said county, and within the jurisdiction of the same court, to wit, on &c., the said *J. F. R.* did appear before the then suitors of the said court, to wit, *J. D.* and *R. F.*, (the same court then

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being the next county court of the said sheriff, holden at *I.* aforesaid, in and for &c., after the replevying and making deliverance in the said second count mentioned; and he, the said *J. F. R.*, having theretofore duly levied his plaint without the writ of our said Lord the King, and the same plaint having theretofore been duly entered in the same court against the said now plaintiff, for the taking and detaining in that count mentioned), and that such proceedings were thereupon had in the said plea, that afterwards and before the exhibiting of the said bill of the plaintiff in this behalf, to wit, on &c., the said plaint, at the instance of the said *J. F. R.*, was duly removed &c. (as in last plea.)

The defendant pleaded, thirdly, to the first count, *actio non*, because, before the making deliverance of the distress in that count mentioned, to wit, on &c., at &c., he, the defendant, being then sheriff as aforesaid, according to the form of the statute in such case made and provided, did take and receive from the said *J. F. R.* pledges for the prosecuting of the suit of the said *J. F. R.* against the now plaintiff, for the taking and detaining in that count mentioned, and also for the return of the said cattle, &c., if a return should be awarded, to wit, a certain bond, as hereinafter mentioned; and the said *J. F. R.*, and one *R. J.*, on the day and year aforesaid, at &c., by the same bond, sealed with their respective seals, and now shewn to the Court here, did jointly and severally acknowledge themselves to be held and firmly bound to the defendant, so being such sheriff, in the sum of 60*l.*, with a condition thereunder written, that if the said *J. F. R.* did and should appear at the then next county court of the said sheriff, to be holden at *I.*, in and for the said county, on *Wednesday*, the 15th day of *February* then next, and then and there prosecute, with effect and without delay, his suit, which he had commenced against the now plaintiff, for wrongfully taking and unjustly detaining his cattle, &c., for *damage feasant*, supposed to be committed as it was

said, and did duly make a return of the said cattle, &c., if a return thereof should be adjudged by law, and likewise did and should keep harmless and indemnified the said sheriff, his county clerk, deputies, bailiffs, and assistants, of, from, and against all action and actions, costs, charges, and expenses, touching, or in anywise concerning, the replevy and delivering of the said cattle, &c., then the said obligation to be void and of none effect, or else to be and remain in full force and virtue; that the said bond, at the time of the taking thereof, and of the making deliverance as aforesaid, was, and still is, a good and sufficient pledge for the pursuing of the said suit, and for the return of the said cattle, &c., according to the form of the statute, and that the said *J. F. R.*, at the time of his becoming pledge and surety in that behalf as aforesaid, and of the making deliverance as aforesaid, was, and still is, a good, able, sufficient, and responsible surety for the pursuing of the said suit as aforesaid, and for the said return as aforesaid, according to the form of the same statute, verification, &c. Fourth plea was to the second count, the same as the last. Fifth plea was to the fifth count, and corresponded with the last.

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General demurrer to the fourth count, and joinder.

Replications—to the first plea, *precludi non*, because heretofore, and before the delivery of the said several writs of *re. fa. lo.* to the proper officer of the said county court, to wit, on &c., at &c., it was duly considered in and by the said county court, that the said *J. F. R.* should take nothing by his said complaints, and that he and his pledges to prosecute should be in mercy, &c., and that the plaintiff should have a return of the said cattle, &c.; verification.

To the second plea there was the same replication. To the third, fourth, and fifth pleas there was a general demurrer and joinder.

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There were also general demurrers to the replications to the first and second pleas and joinder.

The following were the points for argument, as marked by the defendant:—

The defendant contends that the plaintiff cannot recover on either of the three first counts, because there is no obligation on the sheriff to take a replevin bond with two sureties, on distresses for *damage feasant*.

That the fourth count is bad, because it is not the duty of the sheriff to assign the replevin bond to the plaintiff, that he may bring an action in his own name.

That the last count is bad, because the sheriff is not liable personally, after judgment for the avowant, where there has been no breach of duty in him the sheriff.

That the sheriff is not liable for not returning the cattle, &c., because the plaintiff has not obtained final judgment, as is shewn in the first and second pleas.

That the sheriff has done his duty in taking a replevin bond from *J. F. Reeves*, he being a sufficient surety, as is shewn in the third, fourth, and last pleas.

Mansel, for the plaintiff, was desired by the Court to direct his attention to the omission of an award of a writ *de retorno habendo*, which applied to every count in the declaration.—That is unnecessary. It was formerly considered that an action would not lie against the sheriff until after a *scire facias* had been sued out against the pledges; but this was overruled by *Rouse v. Patterson* (a): and the same principle will apply to the writ of *retorno habendo*. *Perreau v. Bevan* (b) was an action against the sheriff for negligence in losing a replevin bond, and it was decided that the want of a *retorno habendo* was not material. [*Bayley*, B.—In that case the avowant had

(a) 7 Mod. 387.

(b) 5 B. & C. 284, S. C. 8 D. & R. 72.

proceeded under the 17 *Car. 2*, c. 7; and the bond there was of a very different description; that was a bond under the 11 *Geo. 2*, c. 19, and, therefore, conditioned for prosecuting the suit with effect, that is, success, and, accordingly, was forfeited immediately on the plaintiff below being nonprossed; but here the avowant would, at common law, be entitled only to a judgment awarding a return of the cattle; and the sheriff, by the statute of *Westminster* the 2nd, 13 *Edw. 1*, c. 2, was directed to take pledges to secure such return, who would not have been liable without a *retorno habendo*, and a return of *elongata* thereon; and therefore the sheriff cannot be liable at an earlier stage of the proceedings.] The defendant is liable for not taking a bond with two sufficient sureties; the statute of *Westminster* speaks of pledges in the plural, and the third count shews that he took only one surety, and that an insufficient one. [Lord *Lyndhurst*, C. B.—It is laid down in *Gilbert's Distress*, that one is sufficient, and many cases are cited in support of it. The owner of the cattle might alone be a sufficient surety, and no count states that he was not so. *Bayley*, B.—The last count is also bad, because it is not the duty of the sheriff to restore the cattle; some further steps should have been taken by the plaintiff.] The pleas are bad, because the judgment below was final, or sufficiently so to prevent the subsequent removal of the proceedings. *Lowfield v. Satchwell* (a) shews, that, after costs have been taxed on a *non pros*, it is too late to remove the suit. And, in *Walker v. Gann* (b), Mr. Justice *Holroyd* says—"It is a sound and wholesome general rule, that a cause should not be removed from an inferior jurisdiction after judgment had been signed there; and the rule is particularly applicable where the defendant suffered judgment by default."

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(a) 1 Wils. 123.

also *Bevan v. Prothesk*, 2 Burr.

(b) 7 Dow. & Ryl. 769; see 1151.

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[*Bayley, B.*—It is not averred that the judgment was final; and the pleas state expressly that the record was removed: if it were not final, the record would not be removed. But it is unnecessary to consider the pleas, if the declaration cannot be supported. All the counts are substantially bad in point of law. The two first counts are for not taking a bond with two sufficient sureties: the sheriff was not bound to do so; one pledge is sufficient. The third count states that, instead of taking a bond from *Reeves* and two sufficient sureties, he took a bond from *Reeves*, and *Jones*, the latter of whom is alleged to be insufficient. That count does not, however, allege that *Reeves* was insufficient, and *non constat* that he was not sufficient as a pledge. The fourth (*a*) count, like all the preceding counts, contains no allegation of a writ *de retorno habendo*. The last count is for not restoring the goods. It is not the sheriff's duty to restore them. His duty was to take pledge. You should have taken the proper means, by suing out a *retorno habendo*.]

Cowling, contra, was stopped by the Court, who gave

Judgment for the defendant.

(*a*) The fourth count seems also to be bad, on the ground that the sheriff is not liable for not assigning a bond in a replevin of goods taken *damage feasant*. See *Combes v. Cole*, Rep. Temp. Hardwicke,

352, cited by *Holroyd, J.*; 5 B. & C. 305. If so, there was a distinct objection to each count, independently of the want of a *retorno habendo*.

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WEDDLE v. BRAZIER.

THE plaintiff filed a declaration *de bene esse*, at the opening of the office on the return day of the writ; and the defendant, on the same day, entered an appearance; but the plaintiff did not give notice of the filing of the declaration until the day after. A rule having been obtained to set aside the declaration filed, and all subsequent proceedings, for irregularity—

Where a declaration is filed, it is deemed to be a good declaration only from the time of giving notice thereof; and, therefore, where a declaration *de bene esse* was filed, and the defendant entered an appearance, before notice was given, the declaration, and all subsequent proceedings, were set aside for irregularity.

Curwood shewed cause, and contended that the general rule that a declaration filed is good only from the time of notice, might lead to this inconvenience, that an appearance might be entered for the defendant, whilst the party who had filed the declaration was merely going from the office to give the notice.

Knowles, contra, relied on the rule as laid down in *Tidd's Practice*, 9th edition, 456.

BAYLEY, B.—The rule may certainly be attended with the inconvenience alluded to; but the practice is as laid down by Mr. *Tidd*, and we must act upon it.

Rule absolute (a).

(a) See *Hutchinson v. Brown*, 7 T. R. 298.

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RODWELL v. CHAPMAN.

If a writ of *capias* be issued into one county, on an affidavit of debt, and no proceeding be taken on it, another original writ of *capias* may be issued into another county, on the same affidavit.

THE plaintiff sued out a writ of *capias*, directed to the Sheriffs of *London*, on an affidavit of debt, made in *London*, on the 8th of *November*. On the 13th he sued out a second writ of *capias*, directed to the sheriff of *Essex*, on which the defendant was arrested, and gave a bail-bond to the sheriff of *Essex*.

Maule now moved to set aside the *second* writ of *capias*, and that the bail-bond might be delivered up to be cancelled; and contended, that the plaintiff ought to have issued an *alias* writ of *capias* into *Essex*, referring to the preceding writ, according to the form pointed out by Rules 6 & 7, *Michaelmas* Term, 3 *Will.* 4; and he added, that the defendant was under a difficulty as to where he ought to put in special bail.

BAYLEY, B.—The affidavit of debt is made where the party making it happens to be; upon which a writ may be sued out into another county. Here the affidavit is made in *London*, and a writ issues there, but nothing is done upon it. Another original process is issued into *Essex*, upon which the defendant is arrested. Bail may be put in in *Essex*. If the arrest had been made on a writ issued on a stale affidavit, that might be a ground of objection; but the writ here was sued out on the 13th, on an affidavit made on the 8th.

GURNEY, B.—If the plaintiff proceeds on the other writ, the defendant may have his remedy.

Rule refused (*a*).

(*a*) To obtain the costs of the first writ of *capias*, the plaintiff ought to have issued an *alias* writ of *capias* into *Essex*.

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1832.

KING v. JONES.

JOHN JERVIS having obtained a rule for judgment as in case of a nonsuit, the question was, whether the defendant was entitled, under the circumstances, to the costs of the day, the rule being discharged on a peremptory undertaking.

A defendant's undertaking to accept short notice of trial, does not entitle the plaintiff to give less than the usual notice of countermand.

The defendant being under terms to accept short notice of trial in a country cause, the plaintiff gave only four days' notice of countermand. Upon which

Lloyd contended, that the defendant, being under terms to take short notice of trial, was not entitled to the usual notice of countermand; but—

Per Curiam.—The defendant's undertaking to accept short notice of trial, does not entitle the plaintiff to limit the time of countermand; but the defendant stands in the same situation in that respect as if he had been entitled to a ten days' notice of trial. If the plaintiff did not intend to have proceeded to trial, he ought not to have given the notice of trial.

Rule absolute.

The same point was decided in a case of *Sutton v. Barnett*.

In re JEFFERY.

UPON a rule *nisi* for an attachment, for not accounting for legacy duties, the affidavits, on which cause was to be shewn, were made before a country commissioner, and af-

The affidavits to shew cause against a rule on the revenue side of the Court of Exchequer must

be filed, and the party who shews cause must take office copies of the affidavits, or have the originals in Court.

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In re JEFFERY.

terwards filed in Court: but no office copies had been obtained by the party shewing cause, nor were the originals in Court when cause was shewn:

Erle proposed to shew cause from the copies of the affidavits in his brief; but

The Court, after reference to the officers, said, that cause could not be shewn unless the Court had before them either the originals or office copies to refer to.

Rule enlarged.

WOOD v. CRITCHFIELD.

Where a copy of a rule served was not intituled in any cause, the party's appearing by counsel to take the objection does not operate as a waiver of the irregularity.

AN affidavit of service of a rule to shew cause why the bail-bond should not be delivered up to be cancelled, had been made on the part of the defendant.

Milner, for the plaintiff, objected that the copy of the rule served was not intituled in the cause.

Turner, in support of the rule, contended that the plaintiff's appearance by counsel operated as a waiver of the irregularity; but—

The Court held it did not; and

Discharged the rule with costs.

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TUCKER v. MORRIS.

IN this case the defendant had obtained a rule under the first section of the Interpleader Act, for relief against the claims of the plaintiff and one *Taylor*. It was an action of trover for two mares; and it appeared from the plaintiff's affidavits that the defendant had taken an indemnity from *Taylor* for not delivering them up: and, on demand being made by the plaintiff, with a tender of the expenses of their keep, he refused to deliver them up. *Taylor* did not appear.

Where a defendant has been indemnified by a third party for not delivering up property in his possession, he has no right to relief under the Interpleader Act, and the Court will discharge a rule obtained for that purpose, with costs.

BAYLEY, J.—As the defendant has thought proper to take an indemnity, he has no right to apply for relief under the act. By so doing he has identified himself with *Taylor*. It seems to me, therefore, that the justice of the case is clear. An application is made to the defendant to deliver up the property, and he refuses, on the ground that he is indemnified by *Taylor*; and as *Taylor* has withdrawn himself, and does not support his claim, the rule must be discharged, and the defendant must pay the costs.

Rule discharged with costs.

CAMPBELL v. ACKLAND.

THE defendant, having been convicted upon three indictments for libel, was sentenced by the Court of *King's Bench* to twelve months imprisonment, in the gaol of *Bury*

gaol upon a conviction for libel, until a week after the imprisonment under the sentence has expired; not until a week after the term for which he was sentenced to be imprisoned.

The Court will enlarge the time for bail to render a defendant who is under imprisonment in a coun-

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St. Edmunds, on the first conviction; and for three months on each of the other two; making, in the whole, the term of eighteen months.

Dunn now moved, on behalf of the defendant's bail in this action, to enlarge the time for rendering the defendant, until a week after the expiration of the term for which he was sentenced; and cited *Rouch v. Boucher* (a), and *Ashmore v. Fletcher* (b).

Per Curiam.—The time should be enlarged until a week after his imprisonment under the three sentences has expired, but not until a week after the expiration of the term for which he was sentenced, as he may be pardoned before the term of the sentence has expired.

Rule accordingly.

(a) 10 Price, 104.

(b) 13 Price, 523.



BRIAN v. STRETTON.

The plaintiff cannot move for a *distringas*, until the expiration of eight days after a copy of the writ of summons has been left for the defendant on the last attempt to serve him personally.

ON the 21st of *November*, a copy of a writ of summons was left at the defendant's dwelling-house, after the requisite number of attempts to serve it personally, without success, had been made. On the 26th,

Montagu Chambers moved for a *distringas*, and stated, that some doubt was entertained on the construction of the statute 2 Will. 4, c. 39, s. 3, as to the time when a plaintiff was entitled to apply for a *distringas*, where the defendant could not be personally served with the writ of summons. Under the old process, the writ was returnable on a day certain; but, by the late statute, the return was

calculated from the day of service; and the defendant was to appear within eight days from the time of service. Now it was uncertain in cases of this kind, when the service was complete; and, therefore, it was doubtful at what time the plaintiff could move for a *distringas*. He admitted, that it might be inferred, from section 2, and the schedule of that statute, that the defendant must have eight days allowed him to obey the exigency of the writ, before a *distringas* could be granted. If so, this application was too early.

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Bayley, B.—The defendant is to have eight days to enter an appearance after the service of the writ of summons, which period of time, in cases where he cannot be personally served, is to run from the day on which the person last called at the defendant's dwelling-house, and left a copy of the process. That ought to be the time from which the eight days are to be calculated; because that is, to a certain extent, service, and is the service upon which the *distringas* is ordered to issue.

The rest of the Court concurring, the writ was

Refused.

BECKE, Gent. one &c. v. WELLS.

ASSUMPSIT by an attorney for business done in the *Middlesex* Court of Requests.

At the trial before *Gurney, B.*, at the *Middlesex* Sitings in *Trinity* Term last, the plaintiff did not prove the delivery of a signed bill. The learned Baron nonsuited the plaintiff, but gave him leave to move to enter a verdict for 2*l.* 14*s.* 8*d.*

A signed bill need not be delivered by an attorney suing for business done in the *Middlesex* Court of Requests.

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A rule was obtained accordingly, against which cause was now shewn by

Gunning.—The case of *Reynal v Smith* (a) does not apply. That was an action by one attorney against another for business done in the Lord Mayor's Court; and it was expressly decided, not upon the 2 *Geo. 2*, c. 23, but upon the 3 *Jac. 1*, c. 7, s. 1, which has always been held to be confined to business done in the superior Courts (b). In the present case the question turns on the 2 *Geo. 2*, which has always received a liberal construction in favour of the client. *Smith v Taylor* (c). [*Bayley, B.*—How is the business done in this Court of Requests?] It need not be conducted by attorney.

In *Ex parte Williams* (d) it was decided, that a bill for business done wholly at the Quarter Sessions was within the act, though the Court had, at first, been of a contrary opinion. The same point was determined in *Clarke v. Dunovan* (e). In *Smith v. Wattleworth* (f), the Court of King's Bench held, that an attorney of a superior Court could not maintain an action for business done in the Insolvent Court without first delivering a signed bill. This decision did not proceed on the ground of the Insolvent Court having a power to appoint attornies of its own, or of its having taxing officers: for Lord *Tenterden* says, "One argument urged for the plaintiff for some time produced a considerable effect upon me, *viz.* that the Insolvent Court can admit persons to practise there, who are not attornies of this or any other Court; and that, consequently, their bills would not be taxable, or within the provisions of 2 *Geo. 2*, c. 23; but many things may be done in other

(a) 2 B. & Ad. 469.

(b) Carthew, 147.

(c) 7 Bing. 262, Lord C. J. *Tindal's* judgment; and see *Winter v. Payne*, 6 T. R. 646; and *Watt v.*

Collins, 1 R. & M. 286.

(d) 4 T. R. 124, 496.

(e) 5 T. R. 694; 1 Esp. 137.

(f) 4 B. & C. 364, S. C. 6 D. & R. 510.

Courts, as, for instance, in the Court of Quarter Sessions, by persons who are not attornies; and no Court could tax the bills of such persons. But when the business has been done by attornies of this Court, it has been held otherwise. The argument, therefore, is by no means conclusive. And as this plaintiff, an attorney of this Court, has done business, which I consider business at law, it appears to me that he, in like manner, is subject to the provisions of the statute. It is said, that the tax master appointed by the Insolvent Court is the proper person to tax such bills. Admitting that he has power to do so, (which, however, I do not decide,) still, that would not be such a taxation as could take the case out of the former act, which is extremely beneficial to the subject."

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The case, *In the matter of Abraham Flint (a)*, is quite decisive of the point. There, the Court of *King's Bench* held, that, entering a plaint, suing a replevin &c. in the county court, was business in a Court of law or equity, within the meaning of the 12 *Geo. 2*, c. 13, s. 9. That is a stronger case than the present, because the 12 *Geo. 2* is a highly penal statute. The *Middlesex* Court of Requests is the county court, regulated by the acts of Parliament by which the commissioners are to decide as shall seem just in *law* and *equity*. They have power to imprison, to administer oaths; their proceedings are to be recorded; they can fine and confine for contempt; and their jurisdiction extends to attornies and solicitors, notwithstanding the privilege of those persons. [*Bayley, B.*—Have they any officer who taxes costs?] It does not appear that they have. In *Lloyd v. Maund (b)*, however, a bill was referred to be taxed for business done in a criminal suit in the Court of Great Sessions, at *Carmarthen*; and though it was objected, that it would be impossible for the Master to tax the costs in *Wales*, not knowing the practice there; yet the Court held, that he could as well

(a) 1 B. & C. 254.

(b) Tidd, 8th ed. 330.

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tax these costs as costs in the Spiritual Courts; and if he were at a loss, he might call in assistance. [*Bayley, B.*—There the taxing officer of the superior Court could refer to the taxing officer below.]

In *Sandom v. Bourn* (a), which was recognised by the Lord Chief Justice of the *Common Pleas*, in *Smith v. Taylor* (b), a charge for preparing a warrant of attorney was held taxable. [*Bayley, B.*—It was considered as a step in a proceeding in one of the Courts of *Westminster Hall*.] In *Ex parte Prickett* (c), a charge for preparing a *dedimus potestatem* was held taxable. In *Fearne v. Wilson* (d), it was held that a charge for attending at a lock-up-house, and filling up a bail-bond, was a taxable item. In *Wardle v. Nicholson* (e), a rule *nisi* has been granted by the Court of *King's Bench*, and is now pending to enter a nonsuit, on the ground that the plaintiff's bill should have been delivered as containing an item for preparing a replevin bond.

Stephen, Serjt., and Mansel, contra.—The words of the 23rd section of 2 *Geo. 2*, c. 23, are “of the Courts aforesaid,” by which it should seem that the restrictive part is confined to cases of business done in some Court where attornies are usually admitted. This was the construction which the statute received at first. In *Ashton v. Molyneux* (f), the Court refused to order the taxation of a bill in the *Doncaster* Court of Requests. In the case of *Williams v. Jackson*, cited in the notes to *Ex parte Williams* (g), *Buller, J.*, said, that by 2 *Geo. 2*, which requires an attorney to deliver his bill, it was not necessary to do so for business done at the Sessions, the statute only prescribing

(a) 4 Camp. 68.

(b) 7 Bing. 262; and see the judgment of *Alderson, J.*, in the same case, *contra*; and see *Burton v. Chatterton*, 3 B. & Ald. 489.

(c) 1 N. R. 266.

(d) 6 B. & C. 86, S. C. 9 D. & R. 157.

(e) From *Appleby Assizes*, 1832.

(f) *Barnes*, 122.

(g) 4 T. R. 124.

it in case of business done in a Court of record, where attornies are admissible and sworn.

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Ex parte Williams (a) was the first case in which the Courts departed from this rule. In that case, however, the Court only sent the bill to be taxed; and it may be asked, on the principle of that case, whether there is any instance of an officer of this Court taxing bills in a Court of Requests. *Clarke v. Donovan* (b) is a still wider deviation from the first construction which was put upon the statute. The Court there entered a nonsuit, the bill containing charges for business done at the Quarter Sessions, and not having been delivered. That case, however, was decided merely on the authority of *Ex parte Williams*. Lord *Kenyon* said, that upon inquiry it was found to be the practice of the Court to tax such bills for business done altogether at the Sessions, and there was no reason for restraining the general words of the first part of the clause, which requires an attorney to deliver his bill one month before he commences any action for the recovery of the amount. On looking at the statute, however, it will be seen that there is reason for construing that part of the statute restrictively, as the clause is necessarily connected with the other parts of the statute. The case of *Lloyd v. Maund* is only to be met with in the manuscript cited in *Tidd's Practice*, and was overruled by *Ex parte Partridge* (c). The Court of Requests in *Middlesex* is not a Court of Record at *Westminster*. In all the cases in which business done in Courts has been held to be taxable, the Courts have been Courts of record; as the Court of Great Sessions in *Wales*, the Courts of Quarter Sessions; so the Court of Insolvent Debtors is a Court of record for some purposes; so the Court of Bankruptcy might be considered as coming within the description of "at equity" in the statute, though the decision as to business done in bankruptcy

(a) 4 T. R. 496.

(b) 5 T. R. 694.

(c) 2 Merivale, 500.

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being taxable (a) has been overruled. *Crowder v. Davies* (b). In *Williams v. Odell* (c), it was held, that as there was no course in practice for taxation of bills in the *House of Lords*, there was no criterion by which the officer of this Court would be enabled to tax a bill for business done in the *House of Lords*, or any means to which he could resort for assistance; and, therefore, the Court refused to grant an order for taxation. It is impossible to distinguish that case from the present. So, a solicitor's bill for business done for a royal charitable foundation, though the office of visitor is exercised by the Lord Chancellor, is not taxable (d).

In *Burton v. Chatterton* (e), Lord *Tenterden* said—"We ought to be quite satisfied, before we nonsuit a plaintiff on this ground, that there was some authority to which these items could have been referred for taxation." In the Insolvent Court, the Court of Quarter Sessions, and the Courts of Great Sessions in *Wales*, there are taxing officers.

The statute only applies to proceedings at law or equity. The Court of Requests is neither one nor the other. The question has been argued as if it had been a matter arising in a common law county court. The *Middlesex* Court of Requests, however, is a Court neither of law nor of equity. Its proceedings are quite different from the common law proceedings of the county court. The Court are to decide as they shall find to stand with equity and good conscience. It was decided in the case of *Scott v. Bye* (f), that the proceedings in a Court of Requests of this nature were not proceedings at law; and the Court of *Common Pleas* on that ground held, that a writ of false judgment did not lie from such court.

(a) *Collins v. Nicholson*, 2 Taunton, 321.

(b) 3 Y. & J. 433.

(c) 4 Price, 279.

(d) 9 Ves. 547.

(e) 3 B. & Ald. 487.

(f) 9 B. Moore, 649, 2 Bing. 344; and see *Tingle v. Roston*, 2 Bing. 463.

BAYLEY, B.—The present impression upon my mind is, that this rule ought to be made absolute. As, however, it is stated to us that a rule involving a point somewhat similar is pending in the Court of *King's Bench*, the execution in this case will be suspended, because we should wish to give this case a greater degree of consideration, if we find that our judgment is opposed to that of the Judges of another Court.

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At present I cannot say that I entertain any doubt. The principal ground on which my judgment is founded is, that the proceedings in this case were in a court in which there is no taxing officer. The question arises on the 2 *Geo. 2*, c. 23, s. 23. That statute provides that no attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees &c., at law or in equity, until the expiration of one month after he shall have delivered his bill &c. And it further provides, that upon application of the party chargeable by such bill &c., unto the Lord Chancellor, Master of the Rolls, or unto any of the Courts aforesaid, or unto a Judge or Baron of any of the said Courts respectively in which the business contained in such bill, or the greatest part thereof in amount or value, shall have been transacted &c., it shall be lawful &c., for the Lord Chancellor, Master of the Rolls, or the said Courts, or a Judge or Baron of the said Courts respectively, to refer the bill for taxation.

The language certainly is, that the order to tax is to be made by the Court in which the business is done, or by a Judge of such Court. There are cases in which there has been a reference for taxation, where the business has been done in a different Court from the one ordering the taxation; but there is no case of referring a bill for taxation for business done in a Court in which there is no taxing officer. The provision is—"to be taxed and settled by the *proper officer* of such Court." There must, therefore, be a proper taxing officer.

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When the case as to business done at the Quarter Sessions came before the Court of *King's Bench*, that Court at first was of opinion that the bill could not be taxed. Why? Because they thought that there was no officer proper to tax it. Why was that opinion afterwards altered? The reason was, as stated by Lord *Kenyon*, that the Court was informed, that the officer of that Court was in the habit of taxing bills of that description.

In the superior Courts of *Westminster Hall*, in the Great Sessions of *Wales*, and in the Insolvent Court, there are taxing officers. In the *House of Lords* there is none. Now, what are the decisions with respect to these Courts? Why, that bills are referred for taxation, for business done in those Courts in which there are taxing officers, and that a bill for business done in the *House of Lords*, where there is no taxing officer, will not be referred for taxation. The distinction, therefore, in my opinion, is, as to business done in Courts where there is a taxing officer, and business done in Courts where there is no taxing officer. If the Court has no taxing officer, the business is not to be considered as done at law or in equity, within the meaning of the provisions of the statute.

In the present case there are attendances in a court, but those attendances are not as an attorney. The Court of Requests has no attornies. From the nature of its business it cannot be expected that attornies should practise in it. An attorney's time is valuable; he has a right to be paid for his time, and there is no provision in the acts relative to these courts for making a compensation to attornies. I apprehend that an attorney, as a matter of right, has no more right to stand forward for a party in a suit in the Court of Requests, than any other person who is not an attorney. Any friend may come forward in behalf of the party in the suit.

Now, what fees are there? There are allowances to be

made to the officers of the Court, but no fees are given by the acts of Parliament to attornies. (The learned Baron then referred to the amount of the particular items, the fees to the high bailiff's clerk, &c. &c. &c.) These charges are of so minute a nature as to shew, that the business of the Court is not such as that an attorney would be likely to be employed about it. If an attorney be employed, there are no fees by which he is to be remunerated; and, if a party will have the assistance of an attorney, he must pay for his attendance as on a *quantum meruit*. Who then is to decide on the amount? A jury must decide on it; no other substitute is provided. If there were a taxing officer, the officer of this Court might call him in. In the Court of Requests, however, there are no fees payable. If there are no fees, it seems to me not to be a court within the meaning of the act of Parliament; and I think that the plaintiff's demand in this case is not for a fee, but for a reasonable compensation to the party for his trouble for appearing, not in the character of an attorney, but in that of a substitute. I am of opinion, therefore, that the bill in this case is not one which required delivery under the statute, and, consequently, that this rule ought to be made absolute.

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VAUGHAN, B.—This is an application to set aside the nonsuit in this case. The question turns purely upon the construction of the clause in the act of Parliament. (The learned Baron then referred to the 2 *Geo. 2*, c. 23, s. 23.) The words are clear, “at law or in equity.” The object is plain; it is to give the client an opportunity of getting the bill taxed by the proper officer; and the clause in terms mentions that it shall be taxed by the officer. The point then upon which, in my opinion, this case ought to be decided, is, that there is no taxing officer in this Court of Requests. Such a bill has never been taxed in practice. One object of the acts for these Courts of Requests is to exclude at-

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tornies; for the decision is not to be by the ordinary course of law, but by the rules of equity and good conscience. The words law and equity in the 2 *Geo. 2*, mean law and equity as administered in the Courts here. The present demand is not a charge in the character of an attorney, but is one upon which a jury must give the compensation which they may think a fit and reasonable remuneration. I think that these are not fees at law or in equity, and that the Court of Requests is not a Court within the meaning of the act 2 *Geo. 2*. This rule must, therefore, be made absolute.

BOLLAND, B.—I am of the same opinion, upon the broad ground stated by my brother *Bayley*, that in this Court of Requests there is no taxing officer. It is not a Court either of law or equity in the sense in which those words are used in the act of Parliament.

GURNEY, B.—I am of the same opinion. The circumstances of there being no taxing officer in this Court of Requests distinguishes this case from all the cases which have been cited on the part of the defendant.

Rule absolute (a).

(a) See *Sylvester v. Webster*, 9 Bing. 388.

HICKS v. MARRECO.

Due diligence was held to have been used in inquiring the name of a de-

R. V. RICHARDS had obtained a rule for delivering up the bail-bond to be cancelled, in this case, on affidavits defendant, under the 32nd Rule of *Hilary Term*, 2 *Will. 4*, although no inquiries had been made of the defendant, or his immediate friends, or at his house or place of business, the debt being large, and the affidavits shewing that there was ground to fear he might abscond if he knew that proceedings were about to be instituted.

stating that the real name of the defendant, who had been arrested for a large sum of money by the name of *A. J. Marreco*, was *Antonio Joaquim Frere Marreco*; that he had carried on business as a merchant, in *London*, for many years; that all his names were entered at the Alien Office, and were in the *London Directory*; and that no inquiry had been made at some places mentioned in the affidavit, where, he swore, he believed his names might have been ascertained if due diligence had been used.

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In opposition, the affidavit of the plaintiff shewed, that he lived in *Bath*, from whence he had sent instructions to his attorney in *London*, and that he was not aware of any means of obtaining information at *Bath*; and the affidavit of the plaintiff's attorney in *London* stated, that he had used due diligence, and had inquired from several persons likely to know, and particularly from one *Octavius Johnson*, and from one — *Lewis*, who refused to tell him, stating that he had particular reasons for not doing so; and the plaintiff's attorney swore that he believed the defendant would have absconded, if he had applied to him or his immediate friends; and that the defendant, in his correspondence, generally used the initials *A. J.*; and that, at the Alien Office, a search is not permitted to be made for any but a political purpose. One *London Directory* was produced in Court, which only contained the initials of the defendant's name.

M^r Mahon shewed cause, and contended, that from the above circumstances it appeared that due diligence had been used to obtain knowledge of the proper name, under the late rule (a).

R. V. Richards, in support of the rule, contended, that it lay in the plaintiff to shew affirmatively that the case was brought within the rule of Court; and that the facts

(a) Hil. T. 2 Will. 4, Rule 32.

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disclosed in the affidavits did not shew sufficient inquiries to make out a case of due diligence.

BAYLEY, B.—I think that due diligence has been used on the part of the plaintiff in this case, within the meaning of the rule of Court. The defendant can have no doubt as to whom was meant, as the writ adopts the initials which he is in the habit of using in his signature.

Now, the question is, whether due diligence has been used to obtain knowledge of the proper name. The plaintiff lived at a distance, and he writes to his attorney in *London* to make the necessary inquiries. The attorney does not apply to the defendant himself, or at his house, or place of business, or to his immediate friends; but we must see whether there are sufficient reasons for his not doing so. It appears from the affidavits that the sum for which the plaintiff is proceeding is a very large one, and misconduct in the transaction is imputed to the defendant; and the plaintiff's attorney swears, that he believes that the defendant would have gone off if he had known that proceedings were about to be instituted. It would, therefore, have been imprudent to go to inquire of the defendant, or of persons who might have communicated to him that such inquiries had been made; but the attorney did go to several persons who were likely to know; amongst others, he goes to *Lewis*, who could have given him the information, but who told him that he had particular reasons for not giving it. It has been said that he did not go to the Alien Office, or look at the *London Directory*: if he could have got information which could be relied upon from these sources, that might be a good argument; but it turns out, that, at the Alien Office, they do not permit a search for a purpose like the present; and when we look at one existing *London Directory*, we do not find the necessary information there; and even if the Directory did contain the full names, a party might run great risk of adopting a wrong name from that information.

I am of opinion, therefore, that, in this case, considerable pains have been taken, which, I think, amount to due diligence, within the meaning of the rule of Court.

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The rest of the Court concurring, the rule was—

Discharged.

WADSWORTH v. MARSHALL.

KNOWLES having obtained a rule to shew cause why an attachment should not issue against the defendant for disobeying a *subpœna ad testificandum*—

Where, at the time of the service of a *subpœna ad testificandum*, the original *subpœna* was not shewn to the witness:—*Held*, that an attachment would not lie for disobedience to such *subpœna*, although the party serving it was not asked to produce it.

J. Williams shewed cause, on an affidavit, stating, that at the time the copy of the *subpœna* was served, the original was not shewn; and contended, that the plaintiff was in no condition to get the attachment, as the original had not been shewn; which was always necessary, where it was sought to bring the party into contempt.

Knowles, contra.—That is not necessary. I can find no case in which it is so laid down. It is not necessary unless the party requires it. [*Bayley, B.*—To move for an attachment, you must have shewn the original rule.] There is a distinction between rules of Court and process. In order to obtain an attachment for disobeying a rule of Court, it is necessary, without demand, to shew the original rule; but, on service of process, it is not necessary to shew the original process, unless required to do so.

BAYLEY, B.—The Master reports to us, that the ordinary course is, to shew the original process at the time of service; and that, unless that be done, an attachment cannot be moved for. Undoubtedly, there are many cases in

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which the service of documents is complete without shewing the originals, unless the party making the service is required to shew them; but there is an exception to that in all cases where the party is to be brought into contempt for disobedience. In that view, therefore, the service here was defective.

Rule discharged.

CONSTABLE v. JOHNSTONE.

The attorney whose name was indorsed on the writ was not an attorney of the Court out of which the process issued, but was an attorney of the other Courts:—*Held*, so far a compliance with Rule 1, *Michaelmas Term*, 1 *Will.* 4, that the Court would not stay the proceedings *in toto*, but only until a proper attorney was appointed; but the costs of the application were ordered to be paid by the attorney whose name was so indorsed.

A RULE having been obtained by *Knowles*, for staying the proceedings in this action, on the ground of the attorney, whose name was indorsed on the process, not having been admitted an attorney of this Court—

Kelly shewed cause, on the affidavit of the attorney, that he was a solicitor in the Court of *Chancery*, and an attorney of the Courts of *King's Bench*, and *Common Pleas*, and that he had been informed, by an officer of this Court, to whom he had made application on the subject, that a solicitor, admitted in the Court of *Chancery*, might practise, without admission in the Court of *Exchequer*.

LORD LYNTHURST, C. B.—Probably the plaintiff's attorney has been misled by receiving his information from an officer on the equity side of the Court. I think the proceedings ought to be stayed until a proper attorney is appointed.

Knowles submitted that he was entitled to have his rule made absolute for a stay of proceedings altogether, as the indorsement of the name of an attorney not on the rolls of the Court was completely nugatory, and was the same as if no attorney's name had been indorsed, and, therefore, an irregularity within R. 1, M. T. 1 *Will.* 4.

BAYLEY, B.—He is an attorney, though not of this Court. *Esch. of Pleas, 1832.*

The Court stayed the proceedings until an attorney of this Court should be substituted; and ordered the present attorney to pay the costs of this application.

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Proceedings stayed.

Earl of FALMOUTH v. THOMAS.

ASSUMPSIT.—The first count of the declaration stated, that before the making of the promise thereafter

Declaration stated that the plaintiff was possessed of a farm,

upon which were certain growing crops, and on which the plaintiff had done certain work and labour, and expended certain materials in making the lands ready for tillage, of which work, labour, and materials he the plaintiff had not derived the benefit; and that, in consideration that the plaintiff would let the farm to the defendant for fourteen years, the defendant undertook to take the crops, and pay for them, and for the work, labour, and materials, according to a valuation: averments—that plaintiff let the farm accordingly, and left the crops upon it; and that the defendant took possession of the farm, and had the benefit of the work, labour, and materials; and that the valuation was made, but that defendant did not pay.

Plea—that the crops, and the benefit of the work, labour, and materials, were not excepted or reserved out of the letting or agreement to let, and that there was no agreement in writing in respect of those causes of action, or any memorandum or note thereof, signed by the defendant, or any person by him lawfully authorized:—*Held*, on demurrer, that the contract was for an interest in land, and that the right to the crops, and the benefit of the work and labour, were both of them an interest in land, within the 4th section of the Statute of Frauds.

To an *indebitatus* count for crops bargained and sold, and under and by virtue of such bargain and sale, accepted and taken, and had and received and cut down by the defendant, defendant pleaded that the crops, at the time of the bargain and sale, were growing upon and affixed to certain lands; and that before the bargain and sale there was a treaty on foot between the plaintiff and the defendant, by which it was proposed that the plaintiff should let the lands to the defendant, and that the defendant should take therewith the said crops; and that the defendant assented to the treaty; and that, in order to carry the treaty into effect, the supposed bargain and sale was verbally contracted between the plaintiff and defendant; and that there was no agreement in writing, or any memorandum or note thereof:—*Held*, that the crops were, at the time of the bargain and sale, an interest in the land, and that the case was within the Statute of Frauds.

Same point held on a similar plea to a count for work, labour, and materials.

In *indebitatus assumpsit* upon an account stated defendant pleaded, that before the taking of the account there was a verbal agreement for the sale of certain crops growing upon the plaintiff's land, and for work, labour, and materials, done and used in preparing the land for tillage; and that there was a treaty for the plaintiff's letting and the defendant's taking the land for fourteen years, to which the defendant assented; and that the money to be paid for the crops, and the work, labour, and materials, was the money concerning which the account was stated; and that there was no agreement in writing, or any note thereof. To this plea the plaintiff replied, that, before the account was stated, the defendant had mown the crops and taken them to his own use, and had and received the amount of the work and labour and materials. The defendant rejoined, traversing that he had cut down the crops, and received the amount of the work and labour, &c., before the stating of the account. General demurrer:—*Held*, that the contract, as appearing on the pleadings, was within the Statute of Frauds, and that the plaintiff could not recover.

In *assumpsit* on a promise to manage a farm in a good and husband-like manner, and according to the custom of the country:—*Semble*, that it is sufficient to assign a breach in the words of the promise.

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mentioned, the plaintiff had been and was lawfully possessed of, and entitled to, a certain farm, lands, and premises, upon which farm, lands, and premises, certain crops of corn and turnips of the said plaintiff, of great value, were then growing and being, and upon divers parts of which said farm, lands, and premises, he, the said plaintiff, had before then, by his servants, done, performed, and bestowed certain work and labour, and used and expended certain materials in and about the preparing and making the same ready for tillage, of which said work and labour and materials he, the said plaintiff, at the time of the making of the promise of the defendant thereafter mentioned, had not derived the benefit, to wit, at &c. And, thereupon, theretofore, to wit, on &c., in consideration that the plaintiff, at the special instance and request of the defendant, would let to him, the defendant, the said farm, lands, and premises, with the appurtenances, excepting and reserving as in that behalf agreed upon, for a certain term, to wit, the term of fourteen years, from the 29th day of *September*, in the year 1827, and upon certain terms in that behalf agreed upon; he, the defendant, undertook, and then and there promised the plaintiff, to take the said growing crops, and pay and allow him for the same, and for the said work, and labour, and materials, according to a valuation thereof to be made by certain persons, to wit, a certain person to be appointed by and on behalf of the said plaintiff, and a certain other person to be appointed by and on behalf of the said defendant, to value the same. And the plaintiff averred, that he, confiding &c., did afterwards let to the said defendant the said farm, lands, and premises, with the appurtenances, for the said term, and upon the terms aforesaid, excepting and reserving as in that behalf agreed upon; and did leave on the said premises the said crops so growing and being thereon as aforesaid; and that the defendant did then and there take possession of the said farm, lands, and premises, and of the

said crops so then and there growing thereon as aforesaid; and that the defendant had and received the benefit of the said work and labour and materials, and took the said crops to his own use, to wit, at &c. And the plaintiff further averred, that afterwards the said growing crops, work and labour, and materials, were fairly valued by one *J. D.*, a person for that purpose duly appointed by and on behalf of the plaintiff, and one *W. P.*, a person for that purpose duly appointed by and on the behalf of the defendant, at a certain sum of money, to wit, 147*l.* 13*s.* Of all which premises the defendant had notice, and was then and there requested to pay the sum of 147*l.* 13*s.* to the plaintiff. Breach for non-payment of that sum.

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The second count was similar to the first, to the end of the valuation by *J. D.* and *W. P.*, and the averment of notice. It then proceeded as follows:—And the said plaintiff further saith, that after such valuation had been so made, to wit, on &c., it was agreed between the plaintiff and the defendant that the said crops, work and labour, and materials, should be again valued by certain other persons, to wit, one *R. J.* on behalf of the plaintiff, and one *T. H.* on behalf of the defendant; and thereupon afterwards, in consideration that the said plaintiff, at the like instance and request of the defendant, had undertaken and promised the defendant to accept and receive of and from the defendant the amount at which the said crops, work, and labour, should be valued by the said *R. J.* and *T. H.*, instead of the said sum of 147*l.* 13*s.* at which the said crops &c. had been so valued as aforesaid, he the defendant undertook and promised the plaintiff to pay and allow him for the said crops, &c., according to such valuation so to be made as last-mentioned; and the plaintiff averred, that, afterwards, the said growing crops, &c., were valued by the said *R. J.* and *T. H.* at a certain sum of money, to wit, the sum of 170*l.* 3*s.*, of all which premises the defendant afterwards, to wit, on &c., at &c., had notice, and was then and there requested to pay the

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said sum of 170*l.* 3*s.* to the plaintiff; concluding with a breach as in the first count, substituting 170*l.* 3*s.* for 147*l.* 13*s.*

The third count was similar to the first count, to the statement of the agreement, which it stated as follows:—
And thereupon heretofore, to wit, on &c., in consideration that the plaintiff, at the like instance and request of the defendant, would agree to let to him the defendant the said farm, lands, and premises, for a certain term of years, to wit, the term of fourteen years, from the 29th day of *September*, in the year of our Lord 1827, and upon certain terms, excepting and reserving as in that behalf agreed upon, and would suffer and permit the said defendant to enter upon and take possession of the said farm, lands, and premises, and to take and have the said growing crops to his own use and benefit, and to have and enjoy the benefit of the said work and labour and materials, he the defendant undertook, and then and there promised the plaintiff, to take the said growing crops, and pay and allow him the said plaintiff for the same, and for the work and labour and materials, according to a valuation thereof to be made by certain persons &c.; and the plaintiff averred, that he, confiding &c., did afterwards, to wit, on &c., at &c., agree to let to the defendant the said farm, lands, and premises, with the appurtenances, for the said term of years, and upon the said terms, excepting and reserving as in that behalf agreed upon, and did leave on the said premises the said crops growing and being thereon as aforesaid, and did suffer and permit the said defendant to enter upon and take possession of the said farm, lands, and premises, and to take and have the said growing crops to and for his own use and benefit, and to have and enjoy the benefit of the said work and labour and materials; and that the defendant did then and there enter upon and take possession of the said farm, lands, and premises, and take and have the said growing crops to and

for his own use and benefit, and have and enjoy the benefit of the said work and labour and materials, to wit, at &c. And the plaintiff further averred, that afterwards, to wit, on &c., at &c, the said growing crops, work, labour, and materials, were fairly valued by one *J. D. &c.*, and one *W. P. &c.*, at a certain sum of money, to wit, 147*l.* 13*s.*; of all which premises the defendant had notice, and was requested &c. Breach as in first count.

The fourth count was similar to the third, only that, like the second count, it stated a second valuation at 170*l.* 3*s.*, and breach accordingly.

The seventh count stated, that the said defendant afterwards, to wit, on &c., at &c., had become and was tenant to the plaintiff of a certain other farm, lands, and premises, with the appurtenances; and in consideration thereof, he the defendant undertook, and then and there promised the plaintiff, to manage, use, and cultivate the said farm, lands, and premises, with the appurtenances, during the said tenancy, in a good and husband-like manner, and according to the custom of the country where the said farm, lands, and premises were situate; and the plaintiff averred, that the said defendant was and continued tenant to the said plaintiff of the said farm, lands, and premises, for a long space of time, to wit, from the time of making his said promise and undertaking hitherto, to wit, at &c.; yet the defendant, not regarding his said promise and undertaking, but contriving &c., did not nor would, during the continuance of the said tenancy as aforesaid, manage, use, or cultivate the said farm, lands, and premises in a good and husband-like manner, and according to the custom of the country where the said farm, lands, and premises were so situate as aforesaid; but on the contrary thereof, he the said defendant, after the making of the said promise and undertaking, and during the continuance of the said tenancy, to wit, on the day and year last aforesaid, and on divers other days and times between that day and the

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day of exhibiting the bill of the plaintiff, to wit, at &c., managed, used, and cultivated the said farm, lands, and premises, in a bad, improper, and unhusband-like manner, and contrary to the custom of the country where the said farm, lands, and premises were so situate as aforesaid, and contrary to the said last-mentioned promise and undertaking of the said defendant, to wit, at &c.

The eighth count stated, that the defendant was indebted to the plaintiff in 200*l.*, for divers crops of corn, wheat, and turnips of the plaintiff, before then bargained and sold by the plaintiff to the defendant, at his request, and by the defendant, under and by virtue of such bargain and sale, before then accepted, had, and received, and mown, cut down, and taken to his own use; and in the sum of 200*l.* before then due, and of right payable by the said defendant to the said plaintiff, for and in respect of certain work and labour before then done, and of certain materials before then used by the plaintiff in and about the preparing and making ready for tillage divers parts of certain lands and premises afterwards let by the plaintiff to the defendant at his request, and of which said work and labour and materials the said defendant had the use and benefit, and for which the said defendant was to pay the said plaintiff; and also in the further sum of 200*l.* for the use and occupation of certain lands and premises of the plaintiff by the defendant, at his like instance and request, and by the sufferance and permission of the plaintiff before then had, held, used, occupied, possessed, and enjoyed; and in the sum of 200*l.* for the price and value of certain goods before then bargained and sold by the plaintiff to the defendant at his request; and in the sum of 200*l.* for the price and value of goods before then sold and delivered by the plaintiff to the defendant, at his request; and in 200*l.* for the price and value of work then and there done, and materials for the same provided by the plaintiff for the defendant, at his request; and in 200*l.*

for money lent, money had and received, and on an account stated. The count then stated a promise, and breach.

Pleas—First, the general issue.

Secondly.—As to the first four counts, *actio non*; because he says that the said several terms of fourteen years each, in the said first four counts of the declaration respectively mentioned, were certain terms of fourteen years, which were to commence respectively from the 29th day of *September*, in the year of our Lord 1827, and which was the 29th day of *September* next before the making of the said promises of the said defendant in the said first four counts respectively mentioned; and the defendant further says, that the said crops in the said first four counts respectively mentioned, and the benefit of the said work, labour, and materials, in those counts respectively mentioned, were not, nor was any part thereof, agreed to be excepted or reserved, nor were they, nor was any part thereof, excepted or reserved out of the lettings in the first and second counts respectively mentioned, or out of the agreements to let in the third and fourth counts respectively mentioned; and the defendant further says, that no agreement in respect of or relating to the causes of action in the first four counts respectively mentioned, or any or either of them, nor any memorandum or note thereof, wherein the said promises of the said defendant in those counts mentioned, or any or either of them, were or was stated or shewn, was in writing, signed by the defendant, or any other person thereunto by him lawfully authorized. And this the said defendant is ready to verify &c.

The third plea.—As to so much of the last count of the declaration as relates to the said sum of 200*l.*, in which the plaintiff therein avers that the defendant is indebted to him the plaintiff for divers crops of corn, wheat, and turnips, bargained and sold by the plaintiff to the defendant, *actio non*;

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because he says, that the said crops, at the time of the said bargain and sale, were growing in and upon, and were affixed to certain lands of and belonging to, and then in the possession of the plaintiff, to wit in the county aforesaid. And that while the crops were so growing in and upon, and were so affixed to the said lands, and just before the said supposed bargain and sale, to wit, on the 14th *November*, in the year 1827, in the county aforesaid, there was a treaty on foot between the plaintiff and the defendant, by which it was proposed, amongst other things, that the plaintiff should let the said lands, with the appurtenances, excepting all timber, trees, and saplings, tin, copper, lead, and all other materials, metals, clay, marl and stone, water and water-courses, and also liberty of hunting, shooting and sporting in, upon, and over the said premises, and also liberty to take in hand any part of the said premises for the purpose of making roads or planting, or any other purpose, on making satisfaction to the said defendant, his executors, administrators and assigns, to hold the same from the 29th day of *September* then last past, for a term of fourteen years thence next ensuing; and that the defendant should take the said lands, with the appurtenances, except as aforesaid, for the said term, and should take therewith the said crops so growing thereupon, and affixed thereto as aforesaid; and thereupon, to wit, on the said 14th day of *November*, in the year aforesaid, in the county aforesaid, and just before the said supposed bargain and sale, the plaintiff and the defendant assented to the terms of the said treaty; and thereupon, in order to carry the terms of the said treaty into execution, the said supposed bargain and sale, in the introductory part of this plea mentioned, was verbally contracted by and between the plaintiff and the defendant, to wit, on &c. And the defendant says, that no agreement in respect of or relating to the said cause of action, in the introductory part of this plea mentioned, nor any memorandum or note thereof,

wherein the said contract of bargain and sale is stated or shewn, was in writing, signed by the defendant, or any other person thereunto by him lawfully authorized. And this he is ready to verify &c.

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The defendant pleaded, fourthly—As to so much of the last count of the declaration as related to the sum of 200*l.*, in which the plaintiff had averred that the defendant was indebted to him, as being due and payable in respect of certain work and labour before then done, and of certain materials before then used by the plaintiff, in and about the preparing and making ready for tillage divers parts of certain lands and premises, which were afterwards let by the plaintiff to the defendant, at his request, and of which work and labour the defendant had the use and benefit, and for which the defendant was to pay the plaintiff, *actio non*—because he says, that the defendant was to pay the plaintiff as aforesaid, by virtue of a certain promise theretofore made by the defendant to the plaintiff; and that just before the making of the said promise by the defendant, to wit, on &c., there was a treaty on foot &c., as in the third plea, to the end.

By the fifth plea, the defendant pleaded—As to so much of the said last count as related to the sum of 200*l.*, in which the plaintiff had averred that the defendant was indebted to him for money found to be due on an account stated between them; that the said account was stated between the plaintiff and the defendant of and concerning certain monies, which the defendant, before the stating of the account, verbally agreed with the plaintiff to pay him, as thereafter mentioned, for divers crops of corn, wheat and turnips, which, at the time of making the same agreement, were growing on certain lands belonging to and in the possession of the plaintiff, and for and in respect of certain work and labour before then done, and certain materials before then used by the plaintiff in and about the preparing and making ready for tillage divers parts of the

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same lands, of which work and labour and materials, the plaintiff, at the time of making the agreement, had not received the benefit. And the defendant further said, that just before the making of the agreement, to wit, on &c., there was a treaty on foot between the plaintiff and the defendant, by which it was proposed that the plaintiff should let the last-mentioned lands, with the appurtenances, with the like exceptions as in the third plea mentioned, to hold the same from &c. for a term of fourteen years then next, and that the defendant should take the lands (except as aforesaid) for the said term; and should therewith take the said crops so grown thereon as aforesaid, and have the use and benefit of the said work and labour and materials; and that thereupon, to wit, on &c., and just before the making of the agreement, the plaintiff and the defendant assented to the terms of the said treaty; and that thereupon, in order to carry the terms of the treaty into execution, to wit, on &c., in consideration that the plaintiff would let the said lands with the appurtenances (except as aforesaid), to the defendant for the said term, and would permit the defendant to take the said crops so growing thereon to his own use, and to have the use and benefit of the said work and labour and materials during the said term, he the defendant verbally agreed with the plaintiff to pay the said plaintiff certain monies for the said crops, and for the use and benefit of the said work and labour and materials; which said monies so agreed to be paid to the said plaintiff by the said defendant as aforesaid, were the same monies, of and concerning which the said account, as in the said last count mentioned, was so stated as in that count is mentioned; and the defendant further said, that no agreement in respect of or relating to the said cause of action in the introductory part of that plea mentioned, nor any memorandum or note thereof, wherein the said agreement so set forth in that plea as aforesaid, or the said account in the said

last count mentioned, or the said promises therein mentioned to pay the said sum of 200*l.*, therein and in the introductory part of that plea mentioned, is stated or shewn, was in writing, signed by the said defendant, or any other person by him thereunto lawfully authorized: concluding with a verification.

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To the seventh count there was a demurrer, stating for causes, that the breach assigned in that count was too general, and that the count did not shew what the custom of the country was which the defendant was stated to have acted contrary to, or what the defendant had committed which was contrary to the custom of the country, nor in what particular the said defendant had broken the said custom; and that the defendant was not sufficiently informed by the said seventh count as to the cause of action of which the plaintiff complained; and that the count was in other respects insufficient &c.

Replication—To the general issue, *similiter*; to the second, third, and fourth pleas, general demurrer; to the fifth plea, *precludi non*, Because, before the stating of the account in the declaration mentioned, the defendant had mown and cut down, and accepted and taken, to and for his own use, the said crops of corn, wheat and turnips, in the fifth plea mentioned, and had taken, had, and received, the amount of the said work and labour and materials, in the same plea mentioned, for and in respect of which the said defendant had verbally agreed to pay the said plaintiff the said monies, of and concerning which the said account was stated by and between the said plaintiff and the said defendant, as in the said fifth plea mentioned.

Rejoinder—To the demurrer to the second, third, and fourth pleas, joinder.

To the replication to the fifth plea, *actio non*; because, admitting that he, the defendant, had mown, cut down,

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and accepted, and taken to and for his own use, the said crops of corn, wheat, and turnips, in the fifth plea mentioned, and had taken, had, and received the amount of the work and labour and materials, in the same plea mentioned; yet, for rejoinder, the defendant said that he did not so mow, cut down, and accept, and take the said crops of corn, wheat and turnips, and take, have and receive the amount of the said work and labour and materials, before the stating of the said account in the said declaration mentioned, in manner and form as the plaintiff in his replication had in that behalf alleged. To this there was a general demurrer and joinder.

Addison, for the defendant.—The breach to the seventh count is too general. It will be said that it is sufficient if it be alleged in the terms of the promise; but that proposition is not true as a general proposition. It may be true if the promise be to do one or two specific acts; but it is not true where the promise is of that comprehensive nature that no information is given by so general a breach of what is the specific fact complained of. *Warn v. Bickford (a)* is a strong case on this subject, for that case must be taken to have been decided, as if the point had arisen on a general demurrer. There the plaintiff had assigned his breach in the words of the covenant; but the Court held such assignment too general, and that it was not cured by pleading over. In the present case, there is nothing definite in the promise. [Lord *Lyndhurst*, C. B.—As far as I remember, it is usual to have special counts, and to add a count of this nature at the end of such a declaration.] It may be so; the pleader may prefer the risk of a special demurrer to that of a nonsuit. In *Com. Dig. Pleader*, (C. 22), in debt upon contract to pay 20s.

(a) 7 Price, 350.

upon waste done, and plaintiff shews that defendant committed waste, it is not sufficient without shewing how the waste was done. So in *Knight v. Keith* (a), *non performance agreementum*, without saying in what particular, is bad. The breach in the seventh count really amounts to nothing more than that he did not perform his agreement. [*Bayley*, B.—It applies to the whole farm, and does not shew in what part the fault is complained of, or in what respect the complaint is made.]

Then, as to the plea to the four first counts.—The case is clearly brought within the fourth section of the Statute of Frauds, and the contract cannot be enforced.—It falls expressly within the reasoning of Mr. Justice *Littledale*, in *Mayfield v. Wadsley* (b). It is admitted on the pleadings, that the bargain for the crops and benefit of the work and labour was part of a contract embracing an interest in land within the statute; and cases need hardly be cited to shew, that if the promise be void in part it is void *in toto*. *Thomas v. Williams* (c). [*Bayley*, B.—In that case the declaration stated the whole promise as entire (d).] So, in *Chater v. Beckett* (e), the defendant promised two things, one within and one not within the statute; plaintiff did all his part, and defendant did all his that was within the statute; and the action was brought for that part which was not within the statute, and failed, because the contract was entire. [*Bayley*, B.—The special count there stated one entire promise.] It could not have been stated otherwise. The plaintiff was not at liberty to split the contract. *Neale v. Viney* (f).

But, independently of the Statute of Frauds, the de-

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(a) *Skinner*, 344; Com. Dig. Pleader, (C. 48.)

(b) 3 B. & C. 365; 5 D. & R. 524.

(c) 10 B. & C. 664.

(d) See this distinction taken in *Wood v. Benson*, 2 Cr. & J. 94.

(e) 7 T. R. 20.

(f) 1 Campb. 471.

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mand in the first four counts is not sustainable. It is admitted on the pleadings, that the crops were promising, and that the work and labour and materials had been bestowed on the land at the time of making the demise stated in the two first counts, and the agreements to demise stated in the third and fourth counts; and that neither the crops, nor the work and labour and materials were excepted out of the demise. The crops, therefore, and the benefit of the work and labour and materials would pass by the demise to the defendant, and belong to him of right under the agreement. And if so, the defendant's submitting to a valuation of the crops, work and labour and materials, whether the valuation were in pursuance of the verbal contract or not, would give no right of action to the plaintiff. It would raise no implied promise in the defendant to pay the amount of the valuation. Even an express promise to pay, under such circumstances, would have been *nudum pactum*.

Then, as to the *indebitatus* counts, and the count on an account stated, the pleas raise the same question on the Statute of Frauds as arises on the pleadings to the two special counts, by shewing that the crops were part of the land, and that the work and labour and materials were incorporated in it, and that the account was stated about the same matters. The pleas, in short, identify the subject-matter of the *indebitatus* counts with that of the special counts, and shew that they are both founded on the same contract; and if the contract cannot be enforced under the special counts, which are adapted to the facts, so neither can it under the *indebitatus* counts. Varying the shape of the counts cannot alter the nature of the contract; and the contract being entire, and the agreement for the crops, work and labour, and materials, being materially mixed with and qualified by the agreement for the land, the plaintiff is not at liberty to declare, as upon a

distinct contract for the crops, work and labour, and materials. In *Neale v. Viney* (a). it was held, that *indebitatus assumpsit* could not be for fixtures and crops taken by valuation under an agreement for the assignment of a lease, the agreement being entire, and the lease never having been assigned, the plaintiff not being able to make a good title.

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Follett, for the plaintiff.—*First*, as to the breach in the seventh count. If it be held that this is a bad breach, every breach in an action of this nature must be held bad. The landlord is not on the spot. He finds, afterwards, that the land is out of condition; and he knows that it has not been cultivated according to the custom of the country and course of good husbandry; but how can he tell in what particular? That is peculiarly within the knowledge of the tenant.

The contract is, that all together shall be so cultivated; not that any particular part shall.

In the books of precedents, advice is given not to particularize in this respect. In *Harris v. Mantle* (b), by particularly negating the committing waste, the plaintiff was tied down to prove waste, which he would not have been, if he had confined himself to the former part of his breach, which was assigned, as here, in the words of the covenant.

The case in *Skinner* is clearly distinguishable; it included matter of fact as well as of law. [Lord *Lyndhurst*, C. B.—It is sufficient to say that he did not keep in repair, in the words of the covenant (c).] It is not sufficient to say, he did not perform his agreement, because that involves matter of law; but if the promise is to do some act, it is quite sufficient to negative the doing of it in the words

(a) 1 Camp. 471.

(b) 3 T. R. 307.

(c) Lut. 329.

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of the promise. The cases are all collected in *Comyns's Digest, Pleader*, (C. 45). [*Bayley, B.*—It does not point out the particular parts of the farm.] That is never done. If the breach was laid for not putting on so much manure, it would point out nothing as to the particular part of the farm, unless it specified such a case. Holding such a breach not sufficient, would only have the effect of lengthening the record; as the pleader would be obliged to specify every default which might be proved, and the defendant would have no real advantage, as he would be quite as much at a loss to know for what the plaintiff was going.

The case in 7 *Price* is peculiar in its circumstances; and there it was not stated what was required to be done, the covenant being *upon reasonable request*. [*Lord Lyndhurst, C. B.*—This judgment is given in a very cautious manner. It is almost an authority in the plaintiff's favour, as to the general rule.] In the case in *Skinner* there was no judgment. In the case from *Comyns's Digest, Pleader*, (C. 22), it was a question of law, whether waste or not waste. In cases of covenants to repair, it is usual to assign the breach in the words of the covenant, though the arguments as to the not knowing the part of the premises complained of would apply equally.

The rule, then, is, that it is sufficient to assign the breach in the terms of the promise, unless it involve some question of law, which is not the case here.

Then, as to the other demurrers. It has been supposed that the crops not being excepted out of the demise, cannot form the subject of another contract. Now there is a difference between the first and second, and the other counts: however, it appears on the record, as to some of those counts, that the defendant had reaped the crops before action brought; and it is material to observe, that the action is not brought to enforce the taking the crops, but to recover the value of those taken.

The old cases upon the Statute of Frauds, in respect to growing crops, have been much shaken by recent decisions. It is difficult to suppose that the sale of crops ever was in the contemplation of the legislature. *Evans v. Roberts* (a), *Smith v. Surman* (b). [Bayley, B.—In *Smith v. Surman* the seller was to cut down. By my notes of that case I find that the timber was to be made a chattel by the seller. Lord Lyndhurst, C. B.—Is not the contract entire? If you will let me land as it is, with crop and all, I will give you what valuers agree upon.] Why may not the landlord in possession of the land make a contract as to the crops, as well as the off-going tenant? It is clear that the off-going tenant might have made such a contract, distinct from the land. On the pleadings, as to the account stated, we charge the defendant, not with refusing to take the land, but with not paying for the crops which he has taken. If we had alleged that he had agreed to take and to pay, it might be different; but we do not allege any breach of that kind. It is no answer to the demand to say that something else was agreed for. In *Wood v. Benson*, and other similar cases, the plaintiff's declaration alleged an agreement for something which was not proved as falling within the Statute of Frauds. On this record we avoid that difficulty. No part of the promise of the defendant is within the Statute of Frauds. [Bayley, B.—The promise here, as shewn on the pleadings, is, to take the crops, and pay for them. Lord Lyndhurst, C. B.—If the crops could be separated from the land, how could the work and labour, which is incorporated with it, be separated from the land demised?] The work and labour can hardly be said to be an interest in land. There may be a contract about the work and labour so incorporated, without the party having any

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(a) 5 B. & C. 829; 8 D. & R.
611.

(b) 9 B. & C. 561; 4 Mann. &
Ryl. 455.

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interest in the land, as in the case of an off-going tenant. [Lord *Lyndhurst*, C. B.—It is averred that the crops are not excepted.] The common counts charge the defendant with being indebted for crops bargained and sold. Now, supposing the original contract not available, by reason of the Statute of Frauds; still, if the defendant takes to the crops, he is answerable. So he is liable on the account stated. *Leeds v. Burrows* (a), *Knowles v. Michel* (b). Such a contract, when executed, cannot be treated as a nullity. *Crosby v. Wadsworth* (c), *Poulter v. Killingbeck* (d), *Teal v. Auty* (e).

The defendant here has taken the crops, and reaped them, and had the benefit of them. The defendant is liable to pay for what he has had.

Cur. adv. vult.

The judgment of the Court was now delivered by—

LORD LYNDHURST, C. B.—The plaintiff in this case insists upon three demands against the defendant, one for growing crops; one for work, labour, and materials; and the third for the mismanagement of a farm: and the questions are, whether he is not prevented by the Statute of Frauds from recovering upon the first and second of these claims, and whether the breach upon the third is not laid too generally.

The first count of the declaration states, that he was possessed of a farm, upon which were certain crops of corn and turnips, and on which he had done certain work and labour, and expended certain materials, in making it ready for tillage, of which work, labour, and materials he had not derived the benefit; and thereupon, in consider-

(a) 12 East, 1.

(b) 13 East, 249.

(c) 6 East, 610, Lord *Ellenborough's* judgment.

(d) 1 Bos. & Pull. 397.

(e) 2 Brod. & B. 99; 4 Moore,

542.

ation that the plaintiff would let him the farm for fourteen years, the defendant undertook to take the crops, and pay for them, and for the work, labour, and materials, according to a valuation. It is then averred that the plaintiff let the farm accordingly, and left the crops upon it; and the defendant took possession of the farm and crops, and had the benefit of the work, labour, and materials. The second count is nearly similar. In the third and fourth counts it is stated, that, in consideration that the plaintiff would agree to let the farm to the defendant for a term of fourteen years, and would suffer him to enter and take the crops to his own use, and have the benefit of the work, labour, and materials, the defendant undertook to take the crops, and allow the plaintiff for the same, and for the work and labour and materials according to a valuation. It is then averred, that the plaintiff did agree to let the farm for the said term, and did leave the crops upon the premises, and suffered the defendant to enter and have the crops, and the benefit of the work, labour, and materials; and the defendant did enter and take the crops, and had the benefit of the work, labour, and materials.

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To these four counts the defendant has pleaded, that the crops, and the benefit of the work and labour and materials, were not excepted or reserved out of the lettings or agreements to let, and that there was no agreement in writing in respect of the causes of action in those counts mentioned, or any memorandum or note thereof. The effect of these pleadings is to raise the objection of the Statute of Frauds to the plaintiff's claim to recover on the four first counts of the declaration. By the 4th section of the statute, no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memo-

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randum or note thereof, shall be in writing. The question then is, whether these counts are founded upon a contract for an interest in land. At the time when each of these contracts, upon which the plaintiff sues, is stated to have been made, the crops were growing upon the land, the defendant was to have had the land as well as the crops; and the work, labour, and materials were so incorporated with the land as to be inseparable from it.

The defendant would not have the benefit of the work, labour, and materials, unless he had the land; and we are of opinion that the right to the crops, and the benefit of the work, labour, and materials, were both of them an interest in the land; but if either of the two were properly an interest in land, this would form a sufficient objection to the special counts; for the crops and work and labour united, are the consideration in each count; and if either part of the consideration fails, the plaintiff cannot be entitled to recover.

The next claim in the declaration is contained in the *indebitatus* count, which states that the defendant was indebted in 200*l.* for crops bargained and sold; and by the defendant, under and by virtue of that bargain and sale, before then accepted, had and received, and cut down and taken to his own use.

To this the defendant has pleaded, that the crops, at the time of the bargain and sale, were growing upon and affixed to certain lands of the plaintiff, then in his possession, and that just before the bargain and sale there was a treaty on foot between the plaintiff and the defendant, by which it was proposed that the plaintiff should let the lands to the defendant for fourteen years, and should take therewith the said crops; and the defendant assented to that treaty; and thereupon, in order to carry the treaty into execution, the said supposed bargain and sale was verbally contracted between the plaintiff and defendant,

and that there was no agreement in writing of the said cause of action, or any memorandum or note thereof. To this plea the plaintiff has demurred; and he insists, that, inasmuch as it is alleged and admitted that the defendant had these crops, he is liable to pay for them, and that the Statute of Frauds is no bar; and he relies on *Teal v. Auty* (a) for that position. But, admitting that the defendant is to pay for the crops, he ought to pay for them, not upon the terms and footing of that bargain and sale, but upon a *quantum meruit*. The crops, at the time of the bargain and sale, were, upon these pleadings, an interest in the land; and to allow the plaintiff to recover upon this bargain and sale, and to have the price regulated by it, would be in direct opposition to the statute, because it would be giving effect to an action upon a verbal contract for an interest in lands.

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The next claim is for the work and labour and materials, to which there is, in substance, a similar plea; and if the claim as to the crops cannot be supported, it follows, *à fortiori*, that this also must fail. Upon the pleadings, it was a contract for that which was, at the time of such contract, an interest in the land, and for that which never was and never could be separated from it. The last claim in respect of the crops, and of the work and labour and materials, is upon the account stated; and the defendant states, that before the taking of the account, there was a verbal agreement for the crops which were growing on the plaintiff's land, and for the work and labour and materials in preparing a part of the plaintiff's land for tillage; that there was a treaty for the plaintiff's letting, and the defendant's taking the land for fourteen years, to which the defendant assented; and that the money to be paid for

(a) 2 Bro. & Bing. 99; 4 Moore, 542.

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the crops, and the work, labour and materials, was the money concerning which the account was stated; and that there was no agreement in writing of and concerning the said cause of action, or any memorandum or note thereof.

To this plea the plaintiff has replied, that, before the account was stated, the defendant had mown the crops and taken them to his own use, and had and received the amount of the work and labour and materials; and the defendant, though he admits he did cut down the crops, &c., and receive the amount of the work and labour, insists that he did not cut down the crops, or have the amount of the work and labour, until after the stating of the account.

The plaintiff's object, therefore, upon the account stated, is to take the case out of the operation of the Statute of Frauds, and to charge the defendant upon a new contract, a contract which the law would imply from the defendant's taking the crops and receiving the benefit of the work, labour, and materials; but this object the defendant has defeated, by shewing that the account was stated when the case stood wholly upon the original contract, and before the mowing of the crops, which was to raise a new contract, had occurred. The objection upon the Statute of Frauds applies to the count upon the account stated, as well as to the other counts.

The only remaining question is upon the seventh count of the declaration, and the objection to that count is, that it is too general. That count is founded upon a promise, in consideration of the defendant being tenant to the plaintiff of a certain farm, to manage it in a good and husband-like manner, and according to the custom of the country where the farm was. The breach was, that he did not; but, on the contrary, managed it in a bad and unhusband-like manner, and contrary to the custom of the country where the farm was. The defendant has demurred specially, on

the grounds that the breach is too general, that the count does not shew what the custom of the country is, or what the defendant has committed contrary to the custom of the country, nor in what he has broken the custom; and that the defendant is not sufficiently informed, by that count, of the cause of action of which the plaintiff complains against him. The count is certainly general, and it might be safer for the plaintiff to amend, than to hazard the opinion of a Court of error.

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Judgment accordingly.

FLEMMING'S Bail.

ONE of the bail was described as a "gentleman," in the notice of bail. On his examination, he stated, that he had been an agent for the sale of *Scotch* ale, until within the last three weeks, in *Southwark*, and was now looking out for another situation of the same description.

One of the bail, carrying on the business of a *Scotch* ale agent, was described in the notice of bail as a "gentleman:"—
Held, a substantial misdescription.

GURNEY, B., considered this a substantial misdescription of the bail, and calculated to mislead; and said, that a person carrying on a trade ought not to be described as a gentleman.

Bail rejected.

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BAKER and Another, Assignees, &c., v. NEAVER, Bart.

In an action by the assignees of a bankrupt, the Court allowed the declaration to be amended by adding the name of the official assignee as a plaintiff, on payment of costs.

HUMFREY having obtained a rule to shew cause why the declaration should not be amended, by adding the name of the official assignee, as a plaintiff in an action brought by the assignees of a bankrupt—

Follett shewed cause, and contended that no such rule had ever been laid down as to allow such an amendment as adding the name of another plaintiff. All the proceedings had been carried on in the names of the present plaintiffs only, and, therefore, there was nothing to amend by: there was no writ, sued out in the name of the official assignee, on which to found the subsequent proceedings. The utmost extent to which the Courts had gone was, to allow one defendant's name to be struck out. The case of *Tabrum v. Tenant* (a) was distinguishable from this case; for there a fresh original was sued out in the name of both the obligors, and the Court there only said that the *capias* might be amended, with the consent of the defendant. If the Court allowed the name of an official assignee to be added, they might, on the same principle, allow the name of any other plaintiff to be inserted. The defendant might have been induced to resist this action for the reason that the official assignee was not joined; and, therefore, if that were the case, it would be a hardship on him that the Court should interfere, by suffering this amendment to be made.

Lord LYNTHURST, C. B.—The official assignee is a person appointed under the provisions of an Act of Parliament; and this is therefore very different from the case of an ordinary plaintiff. If the defendant can make an affi-

(a) 1 Bos. & Pull. 481.

davit that he defended this action on the ground that the official assignee was not joined, that might be a reason for refusing this application. Unless he can do so, I think it is reasonable that we should allow the amendment to be made, on payment of costs.

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BAYLEY, B.—On a writ of error the record has been amended by striking out the name of one of the plaintiffs, and the Christian name of a defendant. This is an action brought by the assignees of the bankrupt. Now, the Bankrupt Act declares that the official assignee shall, in all cases, be an assignee of the bankrupt's estate, together with the assignees to be chosen by the creditors. The defendant, therefore, is not deceived, or put to any real inconvenience, by the correction of this mistake in the number of plaintiffs, and the addition of the name of the official assignee, who ought to be joined.

Rule absolute.

WHITTAKER v. BARKER.

ASSUMPSIT for crops sold, and work, labour, and tillages done to a farm, money had and received, &c. &c. Pleas—general issue, and set-off for rent, tillages, work and labour, and for a sum to be paid as in-coming tenant under an agreement.

At the trial before *Parke, J.*, at the last Summer Assizes for the county of *York*, the following were the facts of the case—

The defendant was the owner of a farm, which becoming vacant at *Lady-day*, 1831, remained in the defendant's

made at his quitting; and the tenant, in the first year of the tenancy, said that he would leave, and his landlord said he might; but no new bargain was made as to his tillages and improvements:—*Held*, that he was not entitled to the value of the tillages and improvements which he left on so quitting.

Where a farm was taken for fourteen years, and the tenant was to pay a given sum for tillages and improvements done before he entered, and to receive the value of the tillages and improvements which he should leave on the farm, according to a valuation to be

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hands until *May*, in which month the plaintiff, by a written agreement, became his tenant for a term of fourteen years, at the rent of 30*l.*; and the plaintiff was to pay him 95*l.* as in-coming tenant for the tillages and improvements which had been done on the farm, &c. &c., and was to receive, upon quitting, from the succeeding in-coming tenant, the value, according to a valuation to be then made, of the tillages and improvements done by him, which he should leave on the farm. The tenant did not pay the 95*l.*, and in the course of the first year of the tenancy some words arose, and he said he would quit, on which the landlord said he might. Shortly afterwards, the plaintiff did quit the farm, and the defendant took possession of it at *Lady-day*, and reaped and took the crops sown by the plaintiff, amounting to 80*l.* He then let it to another tenant, who paid him 95*l.* for the tillages.

The plaintiff at the trial proved a demand of 25*l.* for work done at a house unconnected with the farm; and he claimed 80*l.* for the value of the crops, and 30*l.* for the value of the tillages and improvements left by him on the farm. The learned Judge thought that he was not entitled to the 30*l.* for the tillages and improvements; and as the defendant had a right to claim 30*l.* for the year's rent due at *Lady-day*, and the 95*l.* for the tillages and improvements under the agreement; the plaintiff was nonsuited.

Wightman moved for a rule to set aside the nonsuit, and have a new trial; and he urged, that the plaintiff was, *upon quitting*, entitled under the agreement to receive the value of the tillages; that he had quitted with the landlord's *assent*, and was entitled, therefore, to receive the value of the tillages and improvements. The defendant had actually received from the subsequent tenant 95*l.* for tillages, &c., which belonged to the plaintiff under the agreement, but as the plaintiff had not paid the valuation of 95*l.* made to him as incoming tenant, he could only insist that the sum received by the defendant should be set off against the ac-

count owing: if that sum were not allowed, the landlord would have got the 95*l*. twice over; once from the plaintiff, and once again from the subsequent in-coming tenant; and it was hard that he should have the tillages to the value of 30*l*. for nothing. [*Bayley, B.*—The original bargain is for fourteen years, and the landlord has a right to expect that the tenant will occupy for that period. If he does not, the landlord has a right to have the land in the state in which it is left, without any claim for what had been done to it. The tenant does not quit according to the terms of the original bargain; and if he had said, at the time of the conversation, I expect to receive the value of the tillages from you, it is very probable that the landlord would not have let him off. *Gurney, B.*—The case appeared, at first, to be embarrassed, owing to the different sums claimed on both sides; but the condition of affairs was simply this—The tenant had not paid the 95*l*.; the landlord was not satisfied. The tenant says he will leave; the landlord says, You may; and he does leave without any stipulation as to being paid for the tillages. Then the question, leaving the other sums out of consideration, is simply, whether or no the tenant, so quitting, is entitled to recover the 30*l*. for the tillages.]

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On a subsequent day, *BAYLEY, B.*, delivered the judgment of the Court.

We think that there should be no rule in this case. The plaintiff demands three sums, one of 25*l*. 19*s*. for work done; one of 30*l*. for benefits done by him to the farm, which had become incorporated with it; and 80*l*. for crops which he had sowed, and which the defendant had reaped. Against these amounts, the landlord has a claim of 30*l*. for rent, and of 95*l*. for the sum to be paid to him under the agreement. The circumstances were these. The farm became vacant at *Lady-day*, 1831. In *May* of that year, a bargain was made between the plaintiff and the

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defendant, that the defendant should take the farm for fourteen years, and pay 95*l.* at coming in; and, upon quitting, the succeeding tenant should pay him according to a new valuation; and the important question is, whether the plaintiff is entitled to charge the defendant, as if the tenancy had continued during the whole of the term which was contemplated at the time of making the bargain. The circumstances of quitting were these; the tenant had received indulgence as to the payment of the 95*l.* From his not having paid that sum, words arose, and the tenant says he will quit; the landlord says he might; but there is nothing to amount to a determination of the tenancy or a surrender by operation of law. The defendant takes to the farm at the *Lady-day* following, but there is nothing done on the farm by him, so as to vest the property in him, until he lets it to another tenant. During that period he took the crops, but he took them, (according to the evidence), not for his own benefit, but as accountable to the plaintiff for them, as against the 95*l.* In reality, the question is this, whether the plaintiff is entitled to charge the 30*l.* for tillages done on the farm. It seems to us that he is not so entitled under the circumstances under which he quitted. He quits without his landlord being apprised by any bargain that he is about to quit; and we think that such a quitting is not a quitting under the terms of the tenancy. It was, in reality, a running away; and if a tenant runs away, he entitles his landlord to take possession, without making him compensation for the improvements he may have made upon the lands. The ground of our judgment, then, is this:—There was no bargain made at the time when the tenant left the farm, that he should be paid for the improvements; and, as the case does not, for the reasons stated, fall within the terms of the written agreement, he cannot claim for the improvements under that agreement. The nonsuit, therefore, was right.

Rule refused.

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FISHER and Others, v. BEGREZ.

HOLT had obtained a rule to shew cause why the rule to return the writ of *feri facias* in this cause, served on the Sheriff of *Middlesex*, should not be quashed, and why the Sheriff should not be discharged from the execution of the writ, on the ground of the claim of privilege made by the defendant. This motion was made on the affidavit of the Sheriff's officer, who swore that, on the 15th of *June* last, a writ of *fi. fa.* was delivered to the plaintiff, and a warrant therein was directed to the deponent; and that, having been informed that the defendant might claim his privilege as servant to an ambassador, he the deponent searched, at the office of the Sheriff of *Middlesex*, the list of persons entitled to the privilege of ambassadors and their servants, transmitted by Lord *Palmerston*, one of His Majesty's principal secretaries of state, to the Sheriffs of *London*, and finding therein the name of the defendant as a chorister, entitled to the privileges of his *Bavarian* Majesty's legation at the court of *Great Britain*, he forbore to execute the warrant. The affidavit also stated, that the defendant's name was in the list of the said *Bavarian* embassy, as far back as *April*, 1828, as appeared by a letter from Lord *Dudley*, (at that time secretary of state) then in the Sheriff's office, and that the same had never been removed from the list of such privileged persons. That he had endeavoured to ascertain whether the defendant was a trader within the bankrupt laws, and that he verily believed he was not. That he also verily believed he was not a *British* born subject, and that he was *bonâ fide* attached to the *Bavarian* embassy. That he had been informed, and verily believed, "that the defendant acts and officiates as a chorister in the chapel of the *Bavarian* minister, at this time; and that, on *Sunday* last, *November* 4th, he the said defendant assisted in the performance of divine service in the said chapel."

On an application by the Sheriff to quash a rule to return a writ of *fi. fa.*, it is not sufficient to shew that the defendant's name is in the list transmitted by the secretary of state to the Sheriff's Office, of persons privileged as attached to an embassy, in pursuance of stat. 7, *Ann.* c. 12, s. 5, but it must be clearly shewn that the defendant is in the actual and *bonâ fide* service of the ambassador.

Semble, that a chorister, *bonâ fide* employed by an ambassador in the performance of religious worship in his chapel, is privileged under the 7th *Ann.*

Quære, Under what circumstances, goods of a person so privileged, would be protected from an execution.

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The affidavits in answer stated, that the defendant was not a *Bavarian* subject, or a native of *Bavaria*, but of *France*; that he came to *England* in the year 1814; that from that time he had acted as a public singer, and as a teacher and publisher and composer of music; and that he had been in the habit of selling his own compositions.

Follett shewed cause.—There is no pretence for the Sheriff to come here to apply to have this writ quashed. The defendant is not protected by the 7th *Ann.* c. 12, s. 3. That statute enacts, that all writs and processes against the person or goods of an ambassador or other public minister of a foreign prince or state, or the domestic servant of such ambassador or public minister, shall be utterly null and void. *First*, the defendant is not a domestic servant; and, even if he were, the statute does not protect all such persons, without shewing the nature of the duties which they perform, and the services which the ambassador receives from them. *Secondly*, the statute does not extend to protect all the goods of the domestic servants of the ambassador. To entitle a person to this privilege, it must be shewn what the goods were, or how they were connected with the ambassador's service.

The object of this statute was not to protect persons who were here on their own account, and for their own purposes, and who merely got their names put down by an ambassador on his list, in order to protect them. It is well known, that, after the passing of the statute of *Anne*, persons residing here procured their names to be inserted in the list of persons to be protected: most of them were attached to the *Bavarian* ambassador, who made a profit by it. [*Bayley, B., to Holt.*—You must not only be privileged, but your goods must be privileged also, to succeed in this application.] This defendant is not shewn to be really and *bond fide* attached to the embassy, nor does

he fall within the description of domestic servant. It is merely sworn that he acts as a chorister in the *Bavarian* chapel, which is in *Warwick Street, Golden Square*, whereas the ambassador's house is in *Queen Anne Street, Cavendish Square*. It is admitted that residence in the ambassador's house is not necessary to constitute the character of domestic servant; but it has been adjudged that the nature of the defendant's employment should require his attendance at the house. *Evans v. Higgs* (a). That was the case of a secretary to an ambassador. In *Widmore v. Alvarez* (b), it was expressly held, that he must do some actual service at the house. Here, the defendant does not do any actual service at the house of the ambassador. The only service which it is pretended that he executes is at the chapel. In *Triquet v. Bath* (c), where the defendant claimed privilege as domestic servant to the *Bavarian* envoy, the affidavits shewed actual attendance, and actual service, at the house of the ambassador. But in *Lockwood v. Dr. Coysgarne* (d), though it was sworn that the defendant was hired to Count *Hasling*, the *Bavarian* minister, as his physician, at 40*l.* a-year salary, and that he prescribed for some of his servants, the service was considered merely collusive and colourable, and it was held that the defendant was not entitled to the privilege he claimed. So, in *Seacomb v. Bowlney* (e), it was held, that a chaplain to an ambassador resident here was not protected, because the affidavit did not state that the defendant did any duty; and in *Malachi Carolino's* case (f), the Court decided that the defendant was not entitled to protection, as interpreter to the Bey of *Tripoli*, because it did not appear that he was a domestic servant; and Mr. Justice *Wright* said, "that it did not appear that the de-

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(a) 2 *Strange*, 797.

(b) *Ibid.* Fitzg. 200, *S. C.*

(c) 3 *Burrow*, 1478.

(d) 3 *Burrow*, 1676.

(e) 1 *Wilson*, 20.

(f) *Ibid.* 78.

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defendant had done any one act as a domestic servant; and that it was formerly thought necessary that an ambassador's servant must lie in the house, to entitle him to protection." In *Darling v. Atkins* (a), it was held, that a purser in the navy could not be *bonâ fide* a domestic servant, as the two offices were incompatible. The affidavits here do not shew a *bonâ fide* service; and the fact of the name being in the list in the Sheriff's office is no ground for the Sheriff's refusal to return the writ, if it can be shewn that the appointment was merely colourable. *Delvalle v. Plover* (b). That was an action against the Sheriff for a false return of *nulla bona* to a writ of *fi. fa.*; and Lord *Ellenborough* held, that the fact of the defendant's name appearing in the Sheriff's list was not sufficient to justify the Sheriff in refusing to execute the process.

It is impossible to say that this defendant was a domestic servant. He is a public singer and composer, and a vendor of his own compositions. It does not appear here that he belongs to the ambassador's house, or that he has any service to perform there.

Secondly.—This being an application by the Sheriff to prevent the execution of process against the goods of the defendant, he ought to have gone on to shew that the goods were not liable. The act was meant for the protection of ambassadors, but not to protect the goods of persons carrying on trade in a place with which the ambassador has no connection. The affidavits on the part of the defendant, therefore, ought to have shewn where the goods were. If it had been shewn that they were in the ambassador's house, it is admitted they could not have been seized there. In the case of *Novello v. Toogood* (c), where the servant of an ambassador did not reside in his master's house, but rented and lived in another house, part of which he let in lodgings, it

(a) 3 Wilson, 33.

(b) 3 Camp. 47.

(c) 1 B. & C. 554; 2 Dowl. & R. 833.

was held, that the goods in the house rented by the servant, not being necessary for the convenience of the ambassador, were liable to be distrained for poors' rates. A distinction is there taken between process against the person and the goods of the defendant. *Abbott, C. J.*, says—"My opinion is founded on one point only, viz. that the action is for taking the plaintiff's goods, and not for arresting his person, as to which I give no opinion;" and *Mr. Justice Bayley* says—"This is not the case of an arrest of the person of an ambassador's servant, nor are the goods seized such as were necessary in a residence of that description which the plaintiff's service to the ambassador required." Here it is not stated that the defendant was in the service of the ambassador at all. The cases all shew that there must be some service at the house of the ambassador; and in all the cases where the privilege has been allowed, the servant has been paid by the ambassador. It is not here pretended that any thing is payable by the ambassador for the service of the defendant, or that he receives any salary whatever. There is no appointment, no pay, nor any thing to constitute the relation of master and servant.

Thirdly.—The defendant is here a trader, and comes within the exception in the statute, "that no merchant, or other trader whatsoever, within the description of any of the statutes concerning bankrupts, who shall put himself into the service of any ambassador, shall have or take any benefit by this act." It is sworn in this case, that the defendant gains his livelihood as a public singer and composer, and that he sells his own compositions; he is, therefore, a person clearly subject to the bankrupt laws, and coming within the exception in the fifth section of the statute.

Holt, contrà.—This is not an application made in collusion with the defendant, but *bond fide* made by the She-

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riff for his own protection. All cases of this description must be decided with reference to the principle and policy of the statute of *Anne*, which was passed in affirmance of international law. *First*.—It is said that the defendant is not a domestic servant. But it is not necessary to bring a person who claims privilege within the literal meaning of the words domestic servant. In *Hopkins v. De Robeck* (a) the Court said—"The statute of *Anne* is only explanatory of the law of nations; and the words domestic and domestic servant are only put by way of example." It was objected there, that the defendant was not entitled to protection, because his name was not registered; but the Court ruled otherwise. According to the principle laid down by Lord *Tenterden*, in *Novello v. Toogood*, the defendant is entitled to protection, as his services are connected with the religion of the ambassador; for Lord *Tenterden* there says—"Whatever is necessary to the convenience of an ambassador, as connected with his rank, his duties, and his religion, ought to be protected." [*Bayley, B.*—If you satisfy us that he is a person employed by the *Bavarian* minister to sing in his chapel, we should probably think that he is a domestic servant within the act; but your affidavits do not shew that.] It is not denied, that, had this application been made by the defendant, the affidavits might have been insufficient in not stating more particularly the service that he performed: but here the Sheriff finds the name of *Begrex* in the list of privileged persons. If this notice had come from the ambassador to the Sheriff's office, it might have been different; but here it comes from the *English* Secretaries of State, from Lords *Dudley* and *Palmerston*. [*Bayley, B.*—You do not state that you have asked a single question at the house of the ambassador.] The affidavits state that application was made at the residence of the *Bavarian* ambassador several times, with the

(a) 3 T. R. 80.

intention of stating the case to the ambassador; but that the person applying was not able to see him. The certificate of the Secretary of State is quite sufficient to shew that the defendant is exempt as a chorister. The Sheriff is not bound to make inquiries whether he is really in such a situation, or how often he officiates. The statute certainly says, that no merchant or trader shall take advantage of the act. The affidavits shew that the Sheriff has made inquiries into that point, and was informed that the defendant was not a merchant or trader. It is shewn that the defendant is an attached chorister; and it matters not whether the chapel is contiguous to the house of the *Bavarian* ambassador or not. The officer swears that he believes that the defendant acts as a chorister attached to the *Bavarian* embassy, and that he performed as such on *Sunday* last, the 6th of *November*. The act does not require that any act of service should be performed. It is not necessary, therefore, to prove any actual service. But even if it were, it is here shewn that he does actual service as a chorister. More strictness may be required where the party himself applies, than where the application is made on behalf of the Sheriff. The distinction is important. But, *secondly*, with regard to the distinction which has been put as to the privilege being confined to that description of goods, which are necessary for the convenience of the domestic of an ambassador in his service, it must be observed, that *Novello v. Toogood* is the first case in which any distinction has been taken between the protection of the goods and that of the person. [*Bayley, B.*—If we are all of opinion against you on the first point, it will be unnecessary for you to go into the second.]

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BAYLEY, B.—Without entering into the question as to what goods may be exempt, we are all of opinion that this rule ought to be discharged. When a writ is put

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into his hands to be executed, it is his duty to execute it and to make a return when called on. But if circumstances excuse him from executing it, when called on to return the writ, he may make a return of those circumstances. And in this case, if he considered the defendant's goods were protected, he might have made that return. But the Court is called upon by this application to quash the rule to return the writ, and to relieve the Sheriff from the duty of executing it, and to stop the proceedings *in limine*. In order to induce the Court so to interpose, the affidavits ought to be sufficient to satisfy them, that they are exercising a sound discretion in relieving him from his duty, and preventing the party, at whose instance the writ is issued, from proceeding in the ordinary manner. Now, what is there stated here on behalf of the Sheriff, to induce us so to interfere? He founds himself on the statute of Queen *Anne*, and says, the process was not executed, because the defendant was within the protection of that statute, as a domestic servant to the *Bavarian* minister. Now, what is the enactment of that statute? It is—"That all writs and processes that shall at any time hereafter be sued forth, or prosecuted, whereby the person of any ambassador, &c., or the domestic or domestic servant of any such ambassador, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be null and void." That provision is in limitation of the right of the subject. Now, to what persons does the statute extend the privilege of protection from process against their persons and their goods? To ambassadors and their domestic servants. And when such domestic, or any one on his behalf, makes an application, claiming such privilege, he must shew that he is within the act as filling that character. To constitute a person domestic servant, it is not essential to shew that he resides in the house; but if you

had shewn that this party was a chorister, and in such a situation that the *Bavarian* ambassador required his attendance from time to time, in order to assist in the performance of the religious service of the embassy, I should consider that he was, on this ground, entitled to some of the privileges of a domestic servant. But we ought to be satisfied that he is in such a situation before we hold that he is exempt from the common law liability. Now, in the present case, how can it be said that this is made out? It is not proved by the lists transmitted by Lords *Dudley* and *Palmerston* to the Sheriff's office, for they only shew that he was represented to them as a domestic servant at the time of registering his name. But even if the certificate of the Secretaries of State were a proper foundation on which we could act, it would only shew that the defendant was a domestic servant at that period, and not that he continued so to the present time. That would be a point to be ascertained in a different manner. Is it even shewn that he was a chorister *in the service of the Bavarian ambassador*? I think clearly not. It seems to me that the Sheriff ought to satisfy us, not only that the defendant was certified to be, but that he was, down to the time when the writ was delivered to him to be executed, and is now, a domestic servant. The affidavit is, in my opinion, in that respect, meagre, to say the least of it, and falls far short of what we should expect. It states, that the deponent has made inquiries as to the defendant being a merchant or trader, but it does not state that any inquiries have been made of the *Bavarian* ambassador's servants, or of any persons frequenting the chapel, whether the defendant has been acting as a chorister there; nor does it state how he is attached. He may be attached to the embassy, but not employed in the service of the ambassador. I think that the exemption applies to him only whilst in actual service. The deponent says, that he is informed, and verily believes, that the defendant acts and

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officiates as a chorister "at this time;" but the words "at this time" may mean at the time when the affidavit is sworn, and not on the 15th of *June*, when the Sheriff was required, and bound by his duty, to execute the writ. Therefore, it seems to me, that the Sheriff has failed in shewing that he is entitled to the indulgence which he prays for.

VAUGHAN, B.—I am of the same opinion, and think that the Sheriff has not made out that he is entitled to this relief. The writ of execution comes to the Sheriff's hands so long ago as the 15th of *June*, and he does nothing until the 10th of *November*, when he applies to be relieved from executing the process, by reason of the defendant's privilege. This application is not quite in the ordinary course; and, therefore, he ought to shew quite clearly to us that he was prohibited by this statute from executing the writ; and, in my opinion, he is bound to make out clearly that the defendant is entitled to the protection of the statute. All that the affidavit says, however, is, that the deponent believes that the defendant officiates as a chorister, and that he officiated as such on *Sunday* last, *November* 4th. It is not stated that the ambassador has any connection with the chapel, or that the defendant is paid by him as a chorister; and he might have gone there last *Sunday* merely for the purpose of justifying and giving a colour to this statement in the affidavit. The plaintiff is bound to satisfy us, so as to leave no doubt, that the defendant is a domestic servant of the ambassador; and I am of opinion that he has not done so.

BOLLAND, B.—It is not necessary in this case to decide whether a chorister, really attached to the chapel of a foreign minister, be, within the statute in question, a domestic servant; though, looking at the situation of a foreign minister of the Catholic persuasion in this country, I should

think that, if such person attends at the chapel, and it is a part of his duty to assist in the performance of religious service for the ambassador and his suite, he is protected. But I do not find any statement in this affidavit to that effect; for it merely states, that the defendant officiated on a particular day, and in general terms, that he now officiates as a chorister; and it is well known that many professional singers are employed in these chapels by the week or by the day, to officiate in that character. It is then said, that the facts of the defendant's name being on the list of privileged persons, certified by the Secretaries of State, throws it upon the plaintiff to shew that the defendant is not a domestic servant, and not entitled to privilege or protection as such. If there were any thing in that argument, it would have been applicable in the case of *Darling v. Atkins*, and in the other cases which have been cited; but the object of this list seems to be merely to call the attention of the Sheriff to the names registered, and to protect him, in case the party against whom he has executed process, shall not be registered (*a*). My opinion, that the list ought not to be considered as of any authority on an application like the present, is strengthened by the circumstance, that I find there the name of a person who is a clerk in the Long-room at the Custom-house; who, as such, is obliged to attend there daily on duty, totally incompatible with the duties of domestic servant to an ambassador; and who, on that account, would not be privileged, according to the decision in *Darling v. Atkins*, where it was held that a purser in the navy, who was only liable to be called upon to act in the king's service occasionally, was not such a person as was contemplated by the act, and the Court did not consider themselves bound by the circumstance of the defendant's name being in the register. I am of opinion, therefore, that the Sheriff has

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(a) See 3 T. R. 80; and 3 Camp. 48.

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GURNEY, B.—To sustain this application, the Sheriff must satisfy the Court, either that the certificate of the Secretary of State is of itself a sufficient authority to relieve him from executing the writ, or that the defendant is a domestic servant, and his goods privileged. That the certificate is not enough is manifest from all the cases; and I am decidedly of opinion, that the affidavit makes out nothing like a case of domestic service, so as to entitle the defendant to privilege, and to prevent the plaintiff from obtaining the remedy he is entitled to by law.

Rule discharged.

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HYDE v. LATHAM.

An attorney of another Court, who conducts an action in the *Exchequer* in his own name, can bring no action for his fees, and has no lien for such fees; and the Court will allow one judgment to be set off against another, without regard to his claim of a lien for such fees.

TOMLINSON had obtained a rule to set off the debt and costs which had been recovered in one of these actions against the debt and costs which had been recovered in the other, without regard to the lien (a) of the attorney for costs in the first action, on the ground, that such attorney was not an attorney of this Court.

Wightman shewed cause, and contended, that, at all events the attorney was entitled to his lien for money out of pocket. [*Bayley, B.*—If an attorney, who ought to deliver his bill, does not do so, he cannot recover for the money out of pocket expended in the course of legal proceedings. The question is, whether, not being an attorney of the Court, he can have any lien as attorney.

(a) See Rule 93, Hil. T. 2 W. 4.

Lord *Lyndhurst*, C. B.—The money paid out of pocket is only incidental to his duty as an attorney. He had no right to conduct the cause; the money was laid out in doing what the law forbids him to do (a).

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Collman and *Tomlinson*, *contra*, were stopped by the Court.

Lord *LYNDHURST*, C. B.—We are of opinion that this rule ought to be made absolute. If the party could not maintain an action for his fees (b), he can have no lien for those fees. It follows that the costs may be set off without allowing a lien for a claim which cannot be established.

BAYLEY, B.—The statute having prohibited an attorney from acting except in the Court in which he is an attorney, with this single exception, that he may, with the consent of an attorney of another Court, (such consent being in writing, to be signed by such attorney), and in the name of such attorney, sue and defend, &c., it seems to me that no action can be maintained by him for his fees in conducting an action in disobedience to the provisions of the statute. It follows, that he can have no lien for such fees; and, therefore, this rule must be made absolute.

The rest of the Court concurred, and the rule was made—

Absolute.

(a) 2 Geo. 2, c. 23.

(b) *Holt v. Vincent*, 4 Taunt. 452.

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HUME and Others *v.* BOLLAND and Others.

THE following case was sent by the Lord Chancellor for the opinion of this Court.

Certain stock was vested in trustees, upon trust, amongst other things, to pay the dividends to *A.* during his life; and, after his death, upon trusts for his widow and children. *M. & Co.* were the bankers of the trustees, and employed by them to receive the dividends. During the life of *A.*, the amount of the dividends on the stock was regularly carried to the account of *A.*, in the books of the firm, and drawn for and received by him. *A.* died on the 23rd January, 1824; and, on his death, a new account was opened with the trustees in the books of *M. & Co.*; and in that account, credit was given to the trustees for dividends, amounting to 1403*l.*, as received in April and July, 1824, and the trustees were debited with several sums, amounting to 225*l.*, paid to checks drawn upon the house on the presumption that the dividends had been actually received.

By an indenture bearing date the 9th day of August, 1820, and made between the late Colonel *Bellis*, of the one part, and *Henry Fauntleroy*, *James Deacon Hume*, and *John Goodchild*, of the other part, it was declared that the said *Henry Fauntleroy*, *James Deacon Hume*, and *John Goodchild*, and the survivor of them, should stand possessed of the several sums of 46,000*l.* 3*l.* per cent. Reduced Annuities, 5,300*l.* 4*l.* per cent. Consolidated Annuities, 17,500*l.* Navy 5*l.* per cent. Annuities, which, by an act of Parliament, have since been converted into 18,375*l.* New 4*l.* per cent. Annuities, and 10,000*l.* 3*l.* per cent. Imperial Annuities, then standing in their joint names in the books of the Governor and Company of the Bank of *England*, and of the dividends thereof upon such trusts as Colonel *Bellis* should appoint; and in default of appointment, upon trust, to pay the dividends to Colonel *Bellis* during his life, and, after his decease, upon certain trusts, for the benefit of his widow and children. And by another deed, bearing date July 26, 1822, and indorsed on the said deed of August 9th, 1820, and made between the same parties, it was declared, that the said trustees should stand possessed of 6,000*l.* 3*l.* per cent. Consols, then also standing in their joint names in the said books of the Go-

In point of fact the above dividends had not been received by *M. & Co.*; *F.*, a partner in that house, having, in the lifetime of *A.*, sold and transferred the stock in question by means of forged powers of attorney. *F.* continued, after this transfer, to enter in the day book of *M. & Co.* the amounts of the half-yearly dividends, on the days when they would have become due, as if he had duly received the same at the Bank of *England*, which amounts were, in the ordinary course of business, regularly posted from such day-book to the credit of the trustees by the clerks of *M. & Co.* Commissions of bankrupt issued against the members of the firm of *M. & Co.*, in September and October, 1824:—*Held*, that, at the date of those commissions, the bankrupts were not indebted to the trustees for the balance of the dividends appearing by the books to have been received.

vernor and Company of the Bank of *England*, upon the same trusts as were declared by the said indenture of *August 9th*, 1820.

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The said *Henry Fauntleroy* was a partner in the firm of Messrs. *Marsh, Stracey, Graham, & Fauntleroy*, who carried on the trade of bankers, and who were the bankers of the aforesaid trustees; and during the lifetime of the said Colonel *Bellis*, the amount of the half-yearly dividends on the above-mentioned amounts of stock were from time to time regularly carried to the account of the said Colonel *Bellis* in the books of the said firm, and drawn for and received by him. The said Colonel *Bellis* died on *January 23rd*, 1824, without having exercised any of the powers of appointment given him by the said deeds; and on his death a new account was opened in the books of the said banking-house, intitled "*Trustees of Bellis*;" and the said trustees were likewise from time to time debited in the said books to the said account with several sums of money paid to the children of the said Colonel *Bellis*, in execution of the trusts of the said deeds.

On *September 16*, 1824, a commission of bankrupt was issued against the said Messrs. *Marsh, Stracey, & Graham*; and on the *29th day of October*, 1824, a further commission was issued against the said *Henry Fauntleroy*, upon which said commissions the said parties were duly declared bankrupts; and, at the date and issuing of such commissions, the said account stood in the books of the said *Marsh & Co.*, thus:

<i>Trustees of Bellis.</i>							
1824	£	s.	d.	1824.	£	s.	d.
<i>April 20.</i> Fras. Bellis	10	0	0	<i>April 9.</i> Div. £5300.			
Eliza Do. .	10	0	0	4 P. C. .	106	0	
30. B. P. Bill .	20	0	0	Do. £4600.			
£756 0 0				Red. 3 P.C.	690	0	0
	40	0	0				
<i>June 16.</i> Stamps .	0	4	6		796	0	0
Carried forward	40	4	6				

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HUME v. BOILAND.	Brought forward	40	4	6	Brought forward	796	0	0
	Emily Bellis	20	0	0	July 9. Do. £10,000.			
	Do. . . .	20	0	0	Imp. 3 P. C.	150	0	0
	Frans. Bellis	20	0	0	Do. £18,375.			
Aug. 10.	Emily Bellis	20	0	0	4 P. C. . .	367	10	0
	Fras. Do. .	95	6	0	Do. £6000.			
	Eliza Do. .	10	0	0	3 P. C. . .	90	0	0
	Stamps . .	0	3	0				
	£1177 16 6							
		225	13	6				
	To balance	1177	16	6				
	Carried forward	1403	10	0				
					Sept. 11, 1824.			
					Balance .	1177	16	6
					Brought forward			
						1403	10	0

And a copy of this account was afterwards, and after the death of the said *Henry Fauntleroy*, rendered on demand by the assignees of the said *Messrs. Marsh & Co.* to the said surviving trustees.

The *Frances*, *Eliza*, and *Emily Bellis*, named in such account, were children of the said Colonel *Bellis*, entitled under the said indentures. From the time of the death of the said Colonel *Bellis*, no sums of money were received by the said *Messrs. Marsh & Co.* from the Bank of *England* in respect of dividends upon any of the above-named sums, except one of 90*l.*, which was received by them on *July 9th, 1824*, in respect of the sum of 6,000*l. 3l. per cents.*; and all the principal sums of money above-mentioned (except the said last-mentioned sum of 6,000*l. 3l. per cents.*) had been transferred, or pretended to be transferred, during the lifetime of the said Colonel *Bellis*, without his knowledge, or the knowledge of the said *James Deacon Hume* and *John Goodchild*, by the instrumentality of the said *Henry Fauntleroy*, into the names of other persons, purchasers thereof for valuable considerations, by means of powers of attorney, purporting to have been executed

by the said *Henry Fauntleroy*, *James Deacon Hume*, and *John Goodchild*; but of which the several signatures of *James Deacon Hume* and *John Goodchild* were forged by the said *Henry Fauntleroy*.

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The said *Henry Fauntleroy*, after the sale, or pretended sale, of the said principal stocks, entered in the day-book of Messrs. *Marsh & Co.*, the amount of the half-yearly dividends thereof on the days when they would have respectively become due and payable, as if he had duly received the same at the Bank of *England*, together with the dividends of other persons having accounts with the said bankers; and such amounts were in the ordinary course of business regularly posted from such day-book to the credit of the said trustees by the clerks of the said Messrs. *Marsh & Co.* No part of the money received by the said *Henry Fauntleroy* on the sale, or pretended sale, of the aforesaid amounts of stock was received by or carried to the credit of the said trustees, or either of them.

The question for the opinion of this Court was—

Whether, at the date and suing forth of the said commissions of bankrupt against the said *William Marsh*, *Josias Henry Stracey*, *George Edward Graham*, & *Henry Fauntleroy*, bearing date respectively the 16th day of *September*, 1824, and the 29th day of *October*, 1824, the said bankrupts were indebted to the said *Henry Fauntleroy*, *James Deacon Hume*, and *John Goodchild*, as the trustees of the said Colonel *Bellis*, under the said deeds, in any and what sum of money; and, in considering the said question, no objection of merely a formal nature was to be taken, on the ground that the said *Henry Fauntleroy* was interested (a) as a trustee jointly with the said *James Deacon Hume* and *John Goodchild*, and also a partner

(a) See *Rose v. Poulton*, 2 B. & Ad. 822; and *Richards v. Richards*, *Id.* 44.

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with the said *William Marsh*, *Josias Henry Stracey*, and
George Edward Graham.

Adams, Serjt., for the plaintiffs.—It is a clear principle, that one partner is liable for the acts of another. *Sandilands v. Marsh* (a). There is a class of cases, where agents have given credit in their books to their principals, and have handed accounts to their principals, in which the agents, after such admissions, have not been allowed to dispute their having received the sums so put to the credit of the principal. *Shaw v. Picton* (b), *Shaw v. Dartnell* (c). [*Bayley*, B.—In those cases the agent had delivered the account containing the credit to the principal; here, the agents have done no such thing. In *Shaw v. Picton*, there was an express misrepresentation by which the party was misled. Lord *Lyndhurst*, C. B.—The question on that point will be, whether the circumstances are not such as to shew that the banking-house in effect made a misrepresentation to the customer; whether the entries did not amount to a statement that they had received the dividends. (The learned Lord here read the passage in the accounts referred to, from the case.) There was no other fund out of which those sums could have come, so that the party would be led to suppose that those credits arose from the receipt of the dividends.] If an account be rendered on paper, it is quite clear, from the cases referred to, that the agent cannot afterwards be allowed to dispute a sum admitted to have been received by him. But it is not necessary that there should be the form of passing over a piece of paper. It is quite sufficient if the conduct of the parties, by making entries in their own books, or by any other act which amounts to a misrepresentation, leads the customer into a mistake. Here, the making these

(a) 2 B. & A. 673.

(b) 4 B. & C. 715; 7 D. & R. 211. (c) 6 B. & C. 56; 9 D. & R. 54.

entries from time to time, during so long a period of time, amounts to a misrepresentation. [*Bayley, B.*—A party who makes such a representation is not to be allowed afterwards to deny it if the other party has been injured by being misled.]

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Kelly, contra.—There was no debt, at the date of the commission of bankrupt which could be proveable under the estate of the bankrupts. The case will be found not to range itself within the class of cases where a party has been held to be estopped by the admission of having received money; for it will appear that, in this case, the sum of money in question is still recoverable from the Bank. But, *first*, no action for money had and received could have been maintained by the trustees against *Marsh & Co.* if they had remained solvent. Suppose such action to have been brought, it would have appeared that a false entry had been fraudulently made by one of the plaintiffs; and therefore, not only on the formal objection of one plaintiff being also a defendant, which objection is removed by the order of the Chancellor, but on the ground of the fraud of one of the plaintiffs, no action could have been sustained. [*Bayley, B.*—Supposing *Fauntleroy* to have died, and *Marsh & Co.* to have continued solvent, might not the surviving trustees have sued *Marsh & Co.*?] They could not; for, by the same reasoning, if the other trustees had died, supposing the formal objection removed, *Fauntleroy* might have sued the firm for a cause of action arising from his own fraud. But, to consider the case as standing on the admission in the entries—The entries were never published; and there is no authority to say, that a mere entry, never delivered to the parties, and of which they have no knowledge, can have the effect of precluding the person making it from setting up the truth. [*Lord Lyndhurst, C. B.*—Suppose a memorandum had been found in the hand-writing of *Marsh*, to this effect: "I yesterday received such a sum of money as dividends;" would not that be *prima facie* evidence against

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him that he had received it ?] At all events, it would only be *prima facie* evidence, which might be rebutted by shewing that no money had been received. Even, if it were an actual receipt signed by him, he would not be conclusively bound by it, unless the situation of the other party had been altered by it. [*Bayley*, B.—If the customers went to their bankers to see how their account stood, and had found no entry of the receipts of the dividends, that would have put them upon making inquiries. By writing the entries in the book, things were in readiness to satisfy the customers if they should call.] *Stratton v. Rastall* (a) and *Skiffe v. Jackson* (b) shew that parties are not conclusively bound by signing a receipt. It is admitted, on the part of the defendants, that where parties make representations, either expressly or by their conduct, by which representations the situation of other parties is altered, the persons making such representations are bound by them. That is the distinction laid down by the Court of *King's Bench* on the subject of parties being or not being estopped by their admissions, in *Heane v. Rogers* (c): Mr. Justice *Bayley*, in delivering the judgment of the Court in that case, says—"There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him; but we think that he is at liberty to prove that such admissions were mistaken, or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him) and that transaction." Now, in the present case, the situation of these parties was not altered by the representations or conduct of the bankers. [Lord *Lyndhurst*, C. B.—It was altered thus—A sum of money was wanted. If it had not been paid, the trustees would have insisted on

(a) 2 T. R. 366.

(b) 3 B. & C. 421.

(c) 9 B & C. 577.

receiving the dividends themselves; they would have gone to the Bank to inquire, and would have discovered the transfer.] The legal rights of the parties remained the same, they had exactly the same remedy, and are not in the least degree prejudiced. The money sent by Government to the Bank of *England* for the payment of those dividends is in the hands of the Bank for the use of the plaintiffs, and may be recovered from the Bank of *England*. *Davis v. The Bank of England* (a) shews that the Bank are clearly liable.

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How, then, were these parties prejudiced, and in what respect was their situation altered? If the Bank of *England* be still liable to pay the trustees, the money in question could never have been recovered from *Marsh & Co.*, if that firm had remained solvent, as money had and received by them, on the ground that they were estopped from disputing their receipt of it by their misrepresentation having caused an alteration in the situation of these trustees.

It may be said, that the situation of the trustees is altered in point of convenience; but, although the false representation of a banker, whereby his customer is put to inconvenience, may give the customer a good ground for an action on the case against him, for misrepresentation, or negligence in delaying his remedy, it cannot give him a right to sue for money had and received. The action for money had and received is strictly an action arising on the receipt of money to the plaintiff's use. Suppose an agent represents to his principal, that he has received money on the principal's account, when, in point of fact, he has not received it, can the principal recover against him in an action for money had and received, whilst he can recover against the original debtor? Both actions might be tried at the same time, and could the principal be

(a) 2 Bing. 393; 9 B. Moore, 747.

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allowed to recover against both? The action for money had and received has always been considered an equitable action. But it would be against law and justice, that these plaintiffs should be entitled to recover the money from these defendants, when they may have received it before, or may still receive it, from the Bank of *England*.

Adams, Serjt., in reply.—[*Lord Lyndhurst*, C. B.—Is not this claim one which ought to be measured by unliquidated damages?] That observation would have been equally applicable in *Shaw v. Picton*. The argument used by the defendants as to the money being still recoverable from the Bank of *England*, would shew that the trustees have a right to recover from the Bank even the dividends, the amount of which was actually paid to them by *Marsh & Co*. Suppose that the assignees of *Marsh & Co*. were to sue the trustees for the amount of the dividends paid, as they would contend, by mistake, the money not having been received from the Bank of *England*, they clearly could not recover. [*Bayley*, B.—It may be that they could not recover back from the trustees the 225*l.* 13*s.* 6*d.* paid to them.] Then, the difficulty is, upon what principle would the plaintiffs be entitled to recover all the money in question from the Bank of *England*: for, in that case, they would receive the 225*l.* 13*s.* 6*d.* twice over. [*Bayley*, B.—If they should recover that money from the Bank of *England*, they would have to pay it over to the assignees of *Marsh & Co*.] Wherever it is the duty of a party to receive money as an agent, and he represents to the principal that he has received it, he makes himself liable. [*Lord Lyndhurst*, C. B.—If your situation is not altered, you cannot maintain an action; if it is altered, must not the amount of damages to be recovered depend upon the extent to which it is altered? Suppose there had been a false representation, and the condition of the parties had

not been altered, and that there had been no prejudice, would an action then lie?] The justice of the case is, that the parties should not be allowed to take advantage of their own wrong. Besides, it is not clear that this money can be recovered from the Bank of *England*. The case of *Davis v. The Bank of England* cannot be considered as a decision on that point, as it was afterwards reversed on error in the *King's Bench* (a), upon an objection to the declaration. The question is now before the *House of Lords* in another case.

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LORD LYNTHURST, C. B.—We will send our certificate to the Lord Chancellor.

The following certificate was afterwards sent—

This case has been argued before us by counsel: we have considered it, and are of opinion that, at the date and suing forth of the said commissions of bankrupt against the said *William Marsh*, *Josias Henry Stracey*, *George Edward Graham*, and *Henry Fauntleroy*, the said bankrupts were not indebted to the said *Henry Fauntleroy*, *James Deacon Hume*, and *John Goodchild*, as the trustees of the said Colonel *Bellis*, in any sum of money; and, in considering the said question, we have laid out of the case the formal objection that the said *Henry Fauntleroy* was a trustee on the one hand, and a partner in the house of *Marsh & Co.*, on the other.

LYNTHURST.

J. BAYLEY.

J. GURNEY.

(a) 5 B. & C. 185.

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A will of lands, subscribed by three witnesses in the testator's presence and at his request, is well executed, though none of the witnesses saw the testator sign it, and only two of them saw his signature.

Testator, seised of a reversion expectant on a term of years created as a mortgage for 1,200*l.*, devised the same, and afterwards agreed with *A. B.*, that *A. B.* should pay off the old mortgage, and take an assignment of the term to secure that sum, and 1,800*l.* more to be lent to the testator. The 1,200*l.* was to be paid off immediately; and, until the 1,800*l.* was procured, the term was to be assigned to a trustee for the testator. In pursuance of this agreement the 1,200*l.* was paid off, and the term was assigned to *E. F.* in trust for the testator, his heirs and assigns, and to be held, assigned, and disposed of, as he or they should direct or appoint. Shortly afterwards the term was assigned by *E. F.*, by the direction of the testator, to *A. B.*, to secure the 3,000*l.*:—*Held*, that the will was not revoked.

PURSUANT to a decree of the Court of *Chancery*, the following issues came on to be tried before *Bayley, B.*, at the *Middlesex* Sittings after last *Trinity* Term.

First, Whether the will of *William Eagles Johnson* was duly executed to pass real estates by devise; and,

Secondly, Whether, admitting the will to have been duly executed to pass real estates, it was not rendered inoperative as regarded certain parts of the testator's freehold estates, called respectively *Portway Hall* and *Nimmings*, by certain deeds executed by the testator subsequently to the date of his will. The jury found a verdict for the plaintiff upon the issues, subject to the opinion of the Court on the following case—

The plaintiffs were the children of the testator *William Eagles Johnson*, and the defendant was his infant son and heir-at-law. In the month of *June*, 1826, the testator came from his counting-house into his shop, with a paper in his hand, which was his last will and testament, the whole of which, except the witnesses' signatures, was in his handwriting, and desired *E. S.*, one of his shopmen, to witness it. The counting-house is separated from the shop by a glass door, but behind the counter there is no separation at all between them. *E. S.* went into the counting-house, and, in the testator's presence, signed the said paper. The testator then called in *E. R.* another shopman, who, at his request and in his presence, also signed the said paper as a witness; and afterwards the testator called in *G. W.*, another of his servants in the shop, who also, in the testator's presence, signed the said paper as a witness. This

said paper had been signed by the said testator previous to his requiring any of the persons to witness it, and his signature thereto was then seen by the two first witnesses thereto. *E. S.* was present when *E. R.* and *G. W.* attested the said paper, and *E. R.* was also present when *E. S.* signed, but *G. W.* was not in the counting-house when *E. S.* attested the same, though he was in the shop. *E. R.* and *G. W.* were in the counting-house when they respectively signed their names as witnesses. The said paper was produced at the trial of the issue, and identified by all the witnesses as the same which the testator so required them to sign as witnesses as aforesaid.

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Daniel Johnson, the father of the testator, being seised in fee-simple of a freehold mansion-house and lands, called *Portway Hall*, and certain closes called *Nimmings*, respectively situated at *Rowley Regis*, in *Staffordshire*, executed a mortgage, by which the said house and lands, called *Portway Hall*, were conveyed in fee, and the closes called *Nimmings* demised for a term of five hundred years, to *Nancy Woolly*, for securing the sum of 1,200*l.* and interest. *Daniel Johnson* did not pay off any part of this sum at the time appointed by the mortgage; and by his will devised the said estates comprised therein to the testator, *William Eagles Johnson*, in fee, subject to an annuity of 20*l.*, which he bequeathed to one *Sarah Olden* for her life. The testator, *William Eagles Johnson*, was also, at the time of making his will, and at his death, seised in fee of certain copyhold estates, and was tenant in tail of a freehold estate at *Deritend*, in *Warwickshire*. He was also possessed of certain leasehold estates in *London*. He continued to pay the interest on *Mrs. Woolly's* mortgage till the assignment thereof hereinafter mentioned; and, such mortgage being subsisting on the 27th of *June*, 1826, he made his said will, and executed the same as hereinbefore mentioned, as follows:—"As I am going a journey, and am commanded to set my house in order, that I shall

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die and not live, I hereby make my last will and testament. In the first place, I give in trust unto my esteemed friends, Mr. *William Underwood*, Mr. *Mark Mogridge*, and my faithful wife, *Catherine Johnson*, for the benefit of my children, after allowing my wife 200*l.* a-year during her natural life for her own use, which is to be secured on any part of my property they may think proper, the whole of my freehold, leasehold, and copyhold estates, in the counties of *Stafford, Salop, Worcester, Warwick, and Middlesex*, with all my personal property of every description, I give to them, after the above allowance to my wife as long as she continues unmarried and a widow; if she marries again, then she is to be allowed 50*l.* a-year instead of 200*l.* and her trust also then ceases, as she will no longer be trustee. I will that my children receive their equal proportions as they attain twenty-five years of age, out of the personal property, and their proportion of the income from the estates. I request the trustees to sell any part of the mines under any part of my property, when they consider the most beneficial time to my children's benefit; the estates also, if they consider it of more benefit than keeping them; it is my request, that when my daughters marry, that what fortune they have should be settled on them and their children. If by the sale of my mines the property should be much increased, I will that one-fourth part be funded for the benefit of my wife, in addition to the aforesaid income, if she continues a widow; and, after her death, the said property funded to be disposed of, agreeable with her will; and, in case she dies without a will, to be divided among my daughters, share and share alike. As witness my hand this 27th day of *June*, 1826. *William Eagles Johnson*.—Witness, *Edward Standerwicke, Edward Richardson, George Walker*."

In the month of *May*, 1829, the testator applied to Mr. *Day* to advance him 3,000*l.* upon the security of the said estate, called "*Portway Hall*," and the close called "*Nim-*

mings," mortgaged, as before mentioned, to Mrs. *Woolly*, and which mortgage was then vested in her representatives. Mr. *Day* having assented, it was arranged that he should first provide 1,200*l.* to pay to Mrs. *Woolly's* representatives, and that the said mortgage property should be conveyed and assigned to a trustee, who should afterwards, upon Mr. *Day's* advancing the testator the residue of the 3,000*l.*, convey and assign the same to him.

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Accordingly, by indentures of lease and release and assignment, bearing date the 8th and 9th of *May*, 1829, the release and assignment made between *Benjamin Woolly* (only son and heir-at-law of the said Mrs. *Woolly*, then deceased), of the first part; the said *Benjamin Woolly* and *James Bourne* the younger (two of the trustees and executors of the will of Mrs. *Woolly*), of the second part; *Hartil Dudley*, the other executor of the will of Mrs. *Woolly*, of the third part; the testator, *William Eagles Johnson*, of the fourth part; and *Henry William Bull*, of the fifth part; In consideration of the sum of 1,200*l.*, the said *Benjamin Woolly*, at the request of the said *James Bourne* the younger, *Hartil Dudley*, and *William Eagles Johnson*, bargained, sold, aliened, released, and confirmed, and the said *James Bourne* the younger, and *Hartil Dudley*, remised, released, and for ever quitted claim, the said mansion-house and lands at *Portway*, in the parish of *Rowley Regis*, in the county of *Stafford*, unto and to the use of the said *Henry William Bull*, his heirs and assigns for ever, in trust for the testator, *William Eagles Johnson*, his heirs and assigns, and to be conveyed and disposed of as he or they should direct or appoint. And by the same indenture the said *Benjamin Woolly*, *James Bourne* the younger, and *Hartil Dudley* (at the request of the testator, *William Eagles Johnson*), bargained, sold, assigned, transferred, and set over the said closes, called "*Nimmings*," and the other premises comprised in the said term of five hundred years, unto the said *Henry William Bull*, his executors,

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administrators, and assigns, for the residue of the same term, in trust for the testator, *William Eagles Johnson*, his heirs and assigns, and to be held, assigned, and disposed of, as he or they should direct or appoint.

Shortly after the date and execution of those deeds, pursuant to the arrangement before mentioned, Mr. *Day* advanced the testator the further sum of 1,800*l.*; and by indentures of lease and release and assignment, dated respectively the 29th and 30th of *May*, 1829, the release and assignment being made between the said *Henry William Bull* of the first part, the said testator of the second part, and the said *Charles Day* of the third part, in consideration of the sums of 1,200*l.* and 1,800*l.*, advanced by *Day*, and for the further nominal considerations therein mentioned, the said *Henry William Bull* (at the request and by the direction of the said testator), bargained, sold, aliened, and released, and the said testator granted, released, and confirmed, the messuage and lands called *Portway Hall*, unto and to the use of the said *Charles Day*, his heirs and assigns, subject to the proviso for redemption thereafter contained; and the said *Henry William Bull* (at the like request and direction), assigned to *Day* the closes called "*Nimmings*," for the residue of the term of five hundred years, assigned to him by the before-mentioned deed of the 9th of *May*.

The said deed of the 30th *May*, contains a proviso for redemption, reconveyance, and assignment of the premises mentioned therein, on payment by the testator to *Day* of 3000*l.*, and interest at 5*l. per cent.*, on the 30th *May* then next.

The testator paid off no part of this principal sum of 3000*l.*, but paid up the interest thereon up to the time of his death. He died on the 30th *December*, 1829, without having revoked or altered his said will, leaving *Catherine Johnson*, his widow, and the plaintiffs and defendant, his only children, him surviving.

It was agreed, that the several deeds of the 8th and 9th of *May*, 1829, and the 29th and 30th of *May*, 1829, should be considered as part of this case. The questions for the opinion of the Court were—

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First—Whether the said will of the testator was duly executed to pass real estates; if so, the verdict on the first issue was to stand, otherwise to be entered for the defendant. If the Court should be of opinion, that the said will was duly executed to pass real estates, then—

Secondly—Whether the said deeds of the 8th and 9th of *May*, 1829, and the 29th and 30th *May*, 1829, or any of them, operated as an absolute and entire revocation of the testator's will, as regards the said messuage and lands called "*Portway Hall*," and the closes called "*Nimmings*." If so, the verdict found for the defendant on the second issue was to stand, otherwise a verdict was to be entered thereon for the plaintiffs.

Alexander, for the plaintiffs.—With respect to the first point, *White v. The Trustees of the British Museum* (a), and *Wright v. Wright* (b), are decisive authorities to shew that it is not necessary for the testator to sign the will in the presence of the subscribing witnesses, and that it is sufficient if they sign it in his presence, and at his request, though they do not even know what the nature of the instrument is. Then, as to the second point, namely, whether the deeds stated in the case operated as a revocation of the will. The general rule, that a devise is annulled at law by a subsequent conveyance of the estate, must be admitted; but the principle on which it appears to have been so decided is this: that, inasmuch as by the statute of wills, 32 *Hen. 8*, c. 1, s. 1, the testator must, at the time, be seised of the estate he devises, and continue so seised to the time of his death, any subsequent change in

(a) 6 Bing. 310, 3 M. & P. 689.

(b) 7 Bing. 457, 5 M. & P. 316.

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the estate, which would divest the testator of it, though but for an instant, will operate as a revocation of the will. *Brydges v. The Duchess of Chandos (a)*, *Goodtitle v. Otway (b)*, *Vawser v. Jeffery (c)*. [*Bolland, B.*—There is a case of *Darley v. Darley (d)*.] There are many which may be cited to the same effect; but, in all of them will be found this essential ingredient, *viz.* that there was a change of *estate* produced by the revoking instrument. The only instance at law in which a will remains valid, after a disposition operating upon the entire estate, is that of partition; with respect to which it is held, that, although effected by fine, the will continues in force. *Luther v. Kidby (e)*, *Risby v. Bullinglass (f)*. But the present case is distinguishable from the admitted general rule, on the ground that there was no alteration in the nature of the estate. The testator, at the time when he executed his will, had an equity of redemption in the *Portway Hall* estate, and also a reversion, after the term of five hundred years, in the *Nimmings* closes. When the mortgages were completed, he still had the same estate in each. Therefore, the estates being unchanged by the mortgage transaction, the will was not revoked. [*Bayley, B.*—He had the equity of redemption and the reversion, on different terms, before and after the execution of the deeds. In the one case, he would have the land after payment of 1200*l.*; in the other, after payment of 3000*l.*] Still, it would be the same estate in law, though under an increased charge. The distinction now taken has been sanctioned by Lord *Hardwicke, C.*, in *Sparrow v. Hardcastle (g)*; and [the Master of the Rolls, in *Williams v. Owen (h)*, says, that in *Parsons v.*

(a) 2 Ves jun. 417; 7 Bro. P. C. 505.

(b) 1 Bos. & Pull. 576; 7 T. R. 399.

(c) 3 B. & A. 462.

(d) 3 Wils. 6.

(e) 8 Vin. Abr. 148; 3 P. Wms. 196.

(f) T. Raym. 240.

(g) 3 Atk. 798.

(h) 2 Ves. jun. 599.

Freeman (a), Lord *Hardwicke* had established this principle, that whenever the estate is modified in a manner different from that in which it stood at the time of making the will, there is a revocation; but whenever the testator remains with the same estate and interest exactly, and disposable of by the same means, without any fresh modification, there is no revocation. Upon that distinction the plaintiff is entitled to have this issue certified in his favour. [*Bayley, B.*—As to *Portway Hall*, the testator never had the legal estate; and as to *Nimmings*, a term, in which he had no interest, was conveyed to a new trustee, and he still had the reversion as he had before. In the *Portway Hall* estate, he had nothing.]

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D. Pollock for the defendant.—As to the first point, it must be conceded, that the cases of *White v. The Trustees of the British Museum*, and *Wright v. Wright*, cannot be distinguished from the present case.

With regard to the second question, it is true that the last deeds, of 29th and 30th *May*, left the estate the same as when the will was executed, except as to the quantity of charge upon it. But, during the intermediate time, between the 8th and 9th and 29th and 30th of *May*, the testator had an estate of a different nature from that which he had when he executed his will; for, by the deeds of 8th and 9th *May*, he took the legal estate in the *Portway Hall* property, which he had not had before. [*Bayley, B.*—You contend that the use was not executed in the trustee, but in the testator, by the deeds of 8th and 9th *May.*] Yes. By those deeds the legal estate, which he had not before, was vested in the testator as to the *Portway Hall* estate; and, as to *Nimmings*, he had the reversion of a term in a different person, and on different trusts; and, therefore, after the execution of these deeds, and be-

(a) 3 Atk. 471.

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fore the execution of the latter deeds, he had not the same estate and interest as before, but an estate differently modified; and the will was, therefore, revoked. *Williams v. Owen (a)*, *Brydges v. Duchess of Chandos (b)*, *Harmood v. Oglander (c)*.

[*Bayley, B.*—There is this difficulty; the testator had only an equity of redemption in the *Portway Hall* property. The rule in a Court of law as to revocation is different from that which prevails in a Court of equity. In equity, a mortgage is held a revocation *pro tanto* only. Therefore, we ought to indorse upon this *postea*, that we have not considered the question as to the *Portway Hall* property. Then, with respect to *Nimmings*, there is the same reversion since as before the mortgages, they being merely an assignment of the same term. Lord *Lyndhurst, C. B.*—The termor assigns it, it is the *same* term.]

Lord *LYNDHURST, C. B.*—We are of opinion that the will was duly executed. Then, as to the second point, with respect to *Portway Hall*, that being only an equitable estate, we forbear saying any thing. As to the *Nimmings* estate, we think the will is not revoked; because the reversion is the same that the testator originally had at the time he executed his will, the mortgages having only assigned the residue of the same term of five hundred years.

The learned Baron who tried the issues gave the following certificate:—

I certify that the issues within contained came on for trial before me at the Sittings for *Middlesex* after *Trinity Term, 1832*, when I directed the jury to find a verdict for the plaintiffs on the first and second issues, subject to the opinion of the Court of *Exchequer* as to the execution of

(a) 2 Ves. jun. 599.

(b) *Id.* 417.

(c) 6 Ves. jun. 199.

the will of *William Eagles Johnson*, the testator within named, and as to whether the said will was revoked by the deeds mentioned in the second count of the declaration. And I further certify, that the Court of *Exchequer*, after argument, were of opinion that the will in question was duly executed, and ordered the verdict to be entered for the plaintiffs on the first issue; and that the Court were also of opinion that the deeds above referred to did not operate as a revocation of the said will, so far as regards certain closes called *Nimmings*, being part of the property referred to by the second count of the declaration, and therefore directed the verdict to be entered for the plaintiffs on the second issue also as to those closes; but it appearing that the testator was entitled to an equitable estate only in the freehold mansion and lands, called *Portway Hall*, being the residue of the property referred to by the second count of the declaration, the Court declined giving any opinion whether the deeds operated as a revocation of the will as to that part of the testator's property, conceiving it to be a question more properly cognizable in a Court of equity.

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J. BAYLEY

In the Matter of the Estate and Effects of CATHERINE
CHOLMONDELEY, deceased.

Revenue.

THE usual order had been obtained in this matter against The Earl of *Romney* and Lord *Braybrooke*, the administrators with the will annexed of Mrs. *Cholmondeley*.

By the marriage settlement of Mrs. C., 20,000*l.* was vested in D., E., and F., upon trust, to pay the

dividends to Sir P. F. for life, and after his death to Mr. C. for his life, with remainder to Mrs. C. for her life, and with a power of appointment amongst her children, in case there should be any; and, in default of issue, to such persons as she should by will appoint, in case she died in her husband's lifetime, or by deed or will, in case she should survive her husband; and in default of appointment, amongst her next of kin. Mrs. C. died in her husband's lifetime, having, by her will, appointed this sum of 20,000*l.* to certain persons mentioned in her will:—*Held*, that legacy duty was payable on the 20,000*l.*

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1832.

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ley, the testatrix, and Mr. *Alexander Baring*, Mr. *Francis*, and Mr. *Arbutnot*, the trustees for the execution of the will, for not accounting for legacy duties.

The order was obtained on an affidavit, which stated, that administration with the will and codicil annexed of Mrs. *Cholmondeley*, had been granted to the Earl of *Romney* and Lord *Braybrooke*, the executors of the will of *George James Cholmondeley*, Esq., deceased, who was the husband and sole executor named in the will of the said Mrs. *Cholmondeley*, and who had survived his wife, and died without proving the will.

The affidavit then set out the will of *Catherine Cholmondeley*, as follows:—

This is the last will and testament of me, *Catherine Cholmondeley*. Whereas, I am, by my marriage settlement, empowered, in circumstances therein described, to dispose of the sum of 20,000*l.* I hereby give, subject to the provisions of the settlement, one moiety thereof to my beloved husband, and direct the other moiety to be distributed as follows: To my niece *Mary Elizabeth Johnson*, 4000*l.*, to my niece *Catherine Johnson*, 1000*l.*; and further, I bequeath the sum of 5000*l.* to *John Willing Warren*, Esq., and *John Angerstein*, of *Cumberland Place*, Esq., in trust, that they pay the annual proceeds thereof, in moieties, to my brother and his wife *Eliza*, during their respective lives, the portion of the latter to be received and enjoyed by her independently of my brother or of any other husband with whom she may hereafter marry. And further, that, on the death of either my brother or his wife *Eliza*, his or her moiety shall be paid to the survivor during his or her life, to be held by them respectively, in like manner as their original moieties; and that, at the death of such survivor, they my said trustees divide the capital of the said 5000*l.* between such of the daughters of my said brother and his wife *Eliza*, as shall be living, the share of each to be paid to her on her coming

of age, or being married with consent of guardians; and the shares of such as may die under age and unmarried, to be added to the shares of the survivors, and be considered as part of their original shares; and if it shall eventually happen that any part of the last-mentioned moiety of the said 20,000*l.* shall not be herein disposed of, I give the same, together with all other property which may be mine, either in possession or reversion, to my beloved husband, whom I constitute my residuary legatee and sole executor.

Catherine Cholmondeley.

13th Nov. 1820.

Witness. { *Katherine Dunkinfield.*
 { *J. Lloyd Dunkinfield."*

The affidavit then set out the codicil to the will of Mrs. *Cholmondeley* as follows:—

"Codicil to my will.—Whereas, by the recent decease of my dear niece, *Catherine Johnson*, the legacy of 1000*l.*, which I bequeathed to her in my will, is become void. I now direct that the said 1000*l.* be equally divided between my dear sister *Mary Johnson*, and my niece *Mary Elizabeth Johnson*.

Catherine Cholmondeley.

5th April, 1822."

The affidavit then further stated, that the marriage settlement mentioned in the said will of the said *Catherine Cholmondeley*, was a certain indenture, bearing date the 7th day of *April*, in the year of our Lord, 1814, and made between Sir *Philip Francis* and the said *Catherine Cholmondeley*, by her maiden name of *Catherine Francis*, his daughter, of the first part; the before mentioned *George James Cholmondeley*, Esq., of the second part; and *Alexander Baring*, Esq., *Philip Francis*, Esq., the Right Honorable *George James* Earl of *Cholmondeley*, now deceased, and the Right Honorable *Charles Arbuthnot*, of the third part:—That, in the said indenture it was recited, that a marriage was intended to be shortly had and so-

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lemnized between the said *Catherine Francis* and *George James Cholmondeley*, Esq., and it was agreed by the parties to the said indenture, that the said *Alexander Baring*, *Philip Francis*, *George James* Earl of *Cholmondeley*, and *Charles Arbuthnot*, their executors, administrators, and assigns, should stand and be possessed of the sum of 20,000*l.* in the said indenture mentioned, and the interest thereafter to accrue due thereon, upon certain trusts in the said indenture mentioned, for the benefit of the said Sir *Philip Francis*, during his life, and from and after his decease, for the benefit of the said *George James Cholmondeley*, during his life; and from and after the decease of the survivor of them the said Sir *Philip Francis* and *George James Cholmondeley*, for the benefit of the said *Catherine Francis*, during her life, and from and after the decease of the survivor of them, the said Sir *Philip Francis*, *George James Cholmondeley*, and *Catherine Francis*, Upon certain trusts in the said indenture mentioned, for the benefit of the issue of the said then intended marriage, in case there should be any such issue.

And it was by the said indenture agreed and declared between the parties thereto, that in case there should be no child of the said *George James Cholmondeley*, by the said *Catherine Francis*, his then intended wife, or in case there should be no child who should arrive at the age of twenty-one years, or be married if a daughter, then and in such case the said *Alexander Baring*, *Philip Francis*, *George James* Earl of *Cholmondeley*, and *Charles Arbuthnot*, their or his executors, administrators, and assigns, should stand possessed of and interested in the whole of the said sum of 20,000*l.*, upon and for such trusts, intents and purposes, and subject to such powers, provisoes, conditions, and declarations, as the said *Catherine Francis*, notwithstanding coverture, during the joint lives of herself and the said *George James Cholmondeley*, by her last will and testament in writing, or any testamentary instru-

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ment or appointment in the nature of a will, or any codicil or codicils thereto, to be by her signed and published, respectively, in the presence of, and to be attested by two or more credible witnesses, or as the said *Catherine Francis*, in the event of her surviving the said *George James Cholmondeley*, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by her, after the decease of the said *George James Cholmondeley*, sealed and delivered in the presence of, and to be attested by two or more credible witnesses, or by her last will and testament, or appointment in the nature of a will, or any codicil or codicils thereto, to be by her signed and published respectively, in the presence of, and to be attested by the like number of credible witnesses, should direct or appoint: And, in default of any such direction or appointment, and so far as any such direction or appointment should not extend, it was thereby declared and agreed, that the said *Alexander Baring*, *Philip Francis*, *George James Earl of Cholmondeley*, and *Charles Arbuthnot*, their executors, administrators, and assigns, should stand possessed of and interested in the whole of the aforesaid sum of 20,000*l.*, and the interest or annual proceeds thereof, In trust for such person or persons as would, at the decease of the said *Catherine Francis*, be entitled to her personal estate as her next of kin, according to the statutes for the distribution of the personal estate of persons dying intestate, if the said *Catherine Francis* had died intestate and without having been married.

The affidavit further stated, that the said sum of 20,000*l.* was, previous to the execution of the said indenture, the property of the said Sir *Philip Francis*, the father of the said *Catherine Francis*; and that shortly after the execution of the said indenture, a marriage was duly solemnized between the said *George James Cholmondeley* and *Catherine Francis*; and that there never was any child of the said

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marriage, and that the said *Catherine Cholmondeley* in her lifetime duly made the will and codicil thereinbefore set forth, and some time after making the same departed this life, leaving the said *George James Cholmondeley* her surviving; and that the said *George James Cholmondeley* died on or about the 5th day of *November*, in the year of our Lord, 1830.

Temple and *P. H. Abbott*, for the administrators with the will annexed of *Mrs. Cholmondeley*.

The claim here made by the Crown respects a legacy, if it is to be so termed, or an appointment to pay to certain individuals a sum of 20,000*l*. The question in this case arises under the third schedule of the 55th *George 3*, c. 184; and the distinction between that act and the previous acts is most material in the consideration of this question, because there is less difficulty in contending with the construction to be given to the terms of the existing act of Parliament, than to the terms of the previous acts. By the present act, the legacy duty is made chargeable in the following terms:—"For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l*. or upwards, given by any will or testamentary instrument of any person, who shall have died after the 5th of *April*, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged, after the 31st *August*, 1815." This is the clause of the act to which the attention of the Court is to be directed; and it is clear, that if this is a disposition by will or testament, of *Mrs. Cholmondeley's* personal estate, it is within that clause of the act. But it is conceived that this is not a disposition of the personal estate of *Mrs. Cholmondeley*, and that upon the terms of this act no duty is chargeable,

because it is not her personal estate. *First*, it was not personal estate applicable to the payment of Mrs. *Cholmondeley's* debts. It was not assets either legal or equitable for that purpose. In this case the legal interest was in the trustees of the settlement, and the appointees took under the settlement, and not under the will of Mrs. *Cholmondeley*. In the former act, the 45 *Geo. 3*, c. 38, which was the antecedent Stamp Act, there was a provision very different from the present. The 4th section enacts—"That every gift by any will or testamentary instrument of any person dying after the passing of this act, which, by virtue of any such will or testamentary instrument, shall have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, or which shall have been charged upon or made payable out of any real estate, or be directed to be satisfied out of any monies to arise by the sale of any real estate of the person so dying, or which such person may have power to dispose of, whether the same shall be given by way of annuity, or in any other form, shall be liable to duty as a legacy." If that act had remained in existence, this would have been a very difficult case to contend with: but the 55 *Geo. 3*, repeals altogether the duties granted by the forty-fifth, and confines the duty in respect of legacies strictly in terms to legacies payable out of the personal estate of the testatrix.

With reference, however, to the forty-fifth of *Geo. 3*, it should be observed, that it was plainly the intention of the Legislature by that act to prevent a fraudulent testamentary gift, in the form and under the semblance of an appointment, and to apply to cases in which persons might put their property into trust, reserving to themselves the power of absolute appointment, to avoid the consequence of doing it as a mere testamentary disposition. If, therefore, this case even turned on that act of Parliament, it is sub-

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mitted, that, as this arises on a settlement (and not under the will of the party by whom *the power* of appointment was created), and the money having been vested in trustees for other purposes than those contemplated in the act, and to protect Mrs. *Cholmondeley* against particular parties and interests, it would not be within the mischief contemplated by the 45th *Geo. 3*, and the legacy duty would not have been payable under that statute.

Then the question resolves itself into this—Does a power of appointment of this nature give to the party in whom *the power of appointment* is vested, such an absolute interest in the property to be dealt with as to constitute it in point of law her personal estate? There is a well-known distinction with regard to powers of appointment of property of this kind—If property is given to trustees for such purposes as *A.* shall by deed or will appoint, that is considered as vesting in *A.* an absolute property in the fund; and there, if the power of appointment is exercised, it would be, in the hands of the appointees, applicable to the purposes to which the personal estate of the appointor would be applicable, that is, in paying the creditors; the appointees being in such case considered in equity as trustees for the creditors to the extent of their claims. But that does not extend to a case of this kind; for, where it is given to *A.* for life, then to *B.* for life, with remainder to *C.* for life, with remainder to such persons as *B.* shall appoint, there it is considered not as absolute property, subject to the demands of the creditors, but as property subject to a mere trust to be executed by the appointor, and not at all connected with, or to be considered as his personal estate. That doctrine is recognised in *Bradley v. Westcott (a)*. That was a case in which the property was given to the sole use of the testator's wife for life, and at her full, free, and absolute disposal. That was not so

(a) 13 Vesey, 445.

strong a case as this; because here there is an intervening estate; and, in fact, Mrs. *Cholmondeley* never had any interest whatever during her life; for the preceding life estate of the husband was in existence up to the time of her death, and long after. In the case of *Bradley v. Westcott*, the wife had appointed simply all her personal estate; and the question was, whether, under that description the funds that were vested in the trustees on the trusts mentioned, subject to such a general power, she being the only party interested, did or did not pass. The Court were of opinion it did not pass. [*Bayley*, B.—What is the language of the appointment in that case?] “All my personal estate” in general terms, and “all my estate and interest therein.” [*Bayley*, B.—She does not refer to the power. Then the will may be operative exclusively of the power; it does not operate under the power unless it refers to the power.] Where the power is executed, the appointees will hold for the benefit of the creditors; but they do not lay hold of it as personal property of the appointor, but as is laid down by Sir *John Leach*, in *Jenney v. Andrews* (a): the creditors come into Court, and charge the appointee, and say there is a benefit given to you which ought to be given to us. The executor need not be a party to the bill. [*Bayley*, B.—Is there any authority in a Court of equity, that where there is a general power of appointment which is exercised in favour of particular persons, those persons are bound to pay the debts of the appointor?] Where there is a general power, there equity will lay hold of it in the hands of the appointee. Here, the testatrix had no power of giving the property away in her lifetime, and if she had had issue the power never would have arisen.

In *Bradley v. Westcott* (b), Sir *W. Grant* says, “The distinction is perhaps slight which exists between a gift for

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(a) 6 Maddock, 264.

(b) 13 Ves. 453.

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life, with a power of appointment superadded, and a gift to a person indefinitely, with a superadded power to dispose by deed or will. But that distinction is perfectly established, that in the latter case the property vests. A gift to *A.*, and to such persons as he shall appoint, is absolute property in *A.* without an appointment; but if it is to him for life, and after his death to such person as he shall appoint by will, he must make an appointment in order to entitle that person to any thing. If that distinction exists, it is impossible that the power can be executed by the very words by which property is given." Now, Sir *W. Grant* there perfectly recognises the doctrine contended for on the present occasion, that, by the description of all her personal property, it will not pass; because, according to the rule of law, there is a distinction between that and the personal property to be so dealt with; and in this case there is superadded to the facts which existed in the case of *Bradley v. Westcott*, the material circumstance, that the life-estate of the husband prevented the wife from having any, the remotest, interest in possession in the fund in question. No instance can be found in which a Court of equity, in the administration of the personal estate of a testator or intestate, has considered property subject to such an appointment as this as a subject-matter of distribution as assets. The doctrine alluded to in *Bradley v. Westcott* is also to be found in the case of *Lovell v. Knight* (a). [*Bayley, B.*—The ultimate limitation here is to Mrs. *Cholmondeley's* next of kin. If she made no disposition of it, the next of kin of course would pay no legacy duty. Lord *Lyndhurst, C. B.*—They would take under the settlement.] Yes. Supposing no appointment had been made at all, and this had been a case in which the gift had been to such purposes as Mrs. *Cholmondeley* should appoint, and, in default of appointment to her next

(a) 3 Simons, 275.

of kin; on the authority of the cases, *Mrs. Cholmondeley's* next of kin would have been trustees, in the view of a Court of equity, for the payment of all the creditors, if it had been necessary; but in this case it is submitted, on the authority of *Bradley v. Westcott*, if *Mrs. Cholmondeley* had made no appointment, these parties would have taken, under the settlement, exactly the same as if it had been to 'the next of kin; to *A., B., C., and D.*, by name. And it cannot be denied, that if, instead of an ultimate remainder in default of appointment, it had been to certain persons designated by name, it would have been impossible to have argued that those persons took through a testamentary disposition, as the relatives of *Mrs. Cholmondeley*; but they would take by the form of the deed by which the property was put in trust.

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In the present case the Crown has abandoned all claim to the *probate* duty with respect to this property; that is, as it is apprehended, because probate duty is payable only on the personal estate of the deceased; and it is therefore an admission, that it is not strictly, and in point of law, the personal estate of the person making the appointment. If that be so, it is incumbent on the counsel on the other side to shew some distinction which makes the duty chargeable on a *legacy*, when the property is not chargeable *quod* personal estate with probate duty. They cannot prevail here, unless they can shew some specific words in this act of Parliament, by which it shall appear that the legislature has created some specific charge. But if it be a legacy in the ordinary terms, if it be a legacy of her personal estate, it is of necessity such personal estate, as, under the previous clauses of this act are liable to probate duty as personal estate.

Lowndes and *Follett* for the trustees.—The Crown has no right to call upon the trustees to appear before the

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Court under any of the acts in question. They appear here, on the present occasion, by arrangement; but it is material to observe, that the Crown has no power to compel them to do so. There is no provision, in any of the acts authorizing the Crown to proceed against the trustees of a marriage settlement, either by rule to account, by information, or in any other way. Even if this were in other respects a legacy liable to duty, within the provisions of the legacy duty acts, how could the Crown enforce the duty. The Legislature having provided no means of recovering the duty, is a strong argument to shew that they did not intend to impose the duty in such a case.

The authority, under which it is supposed that the Crown have the power of calling upon the trustees, is the 42 Geo. 3, c. 99, s. 2, which is as follows: "That in every case in which any executor or administrator shall not have paid the duties granted and payable upon or in respect of any legacies, or any personal estate, or any share or shares of any personal estate of any persons dying intestate, by and in pursuance of 'the act of Parliament,' then it shall be lawful for his Majesty's Court of *Exchequer*, upon application to be made for that purpose on behalf of the commissioners appointed for managing the duties on stamped vellum, parchment, or paper, on such affidavit or affidavits as to the said Court shall appear to be sufficient, to grant a rule, requiring such *executor* or *administrator* to shew cause why he, she, or they should not deliver to the said commissioners an account, upon oath, of all the legacies, or of the personal property, respectively paid, or to be paid or administered by him, her, or them, as the case may be, and why the duties on any such legacies, or any shares, or residue of any such personal estate, have not been paid, or should not forthwith be paid, according to law." That provision gives power to call upon the *executors* or *administrators* only, to account. It is clear

that there is no power to compel such trustees as these to come in to account.

By the 36 Geo. 3, c. 52, s. 5, "in order that all persons may be enabled to take receipts and discharges, on the payment or satisfaction of any legacy, or residue of any personal estate, or any part thereof," the commissioners of stamp duties are directed from time to time to provide sufficient quantities of paper adapted for such receipts or discharges, and to cause to be printed thereon the form of words in the schedule annexed. Now the schedule gives the following form:—

"Form to be used by the commissioners of the stamp duties in providing blank forms for receipts and discharges given under this act.—Stamp Office.—On account of the personal estate of ——— deceased. Received the ——— day of ——— the above balance in [full or part, *as the case may be*] of my [legacy, or share, *as the case may be*] out of the personal estate above mentioned." So that, according to the form of the receipt, it is a receipt for a legacy received out of the personal estate of the party dying.

Then the sixth section of that act is in these terms—
 "And be it further enacted, that the duties hereby imposed shall, in all cases in which it is not hereby otherwise provided, be accounted for, answered, and paid, by the person or persons having or taking the *burthen of the execution of the will*, or other *testamentary instrument*, or the *administration of the personal estate of any person deceased*, upon retainer for his, her, or their own benefit, or for the benefit of any other person or persons, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, which he, she, or they shall be entitled so to retain, either in his, her, or their own right, or in the right, or for the benefit, of any other person or persons; and also upon delivery, payment, or other satisfaction or discharge whatsoever of any legacy, or any part of any legacy, or of the residue

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of any personal estate, or any part of such residue, to which any other person or persons shall be entitled." So that the persons to pay the legacy duty are those persons taking upon themselves the burthen of the administration of the will, and having power out of that either to retain or pay the duty. What persons, then, are there before the Court within the description in the sixth section? They are to be the persons who have taken upon themselves the burthen of the will. In the present case, the executors of the husband had no power to retain or pay. Therefore, they cannot be the persons who are mentioned in this act; for they cannot retain or pay it; and it is out of that payment or retainer that the legacy duty is payable. Then, with regard to the trustees under the settlement, acting under its directions, it is clear that they cannot be brought under the provisions of the act. If the Attorney-General files an information against them, they have a right to come into this Court, and ask by what authority they are so brought here, the act designating the persons against whom the Crown is to have its remedy, and the trustees under this settlement not falling within that provision.

The 45 *Geo. 3* was the first act of Parliament which imposed a legacy duty on legacies charged on real estate. Then it became necessary for the legislature to make a new provision as to persons against whom the duty could be recovered. Therefore, they make a new provision, making the trustees of real estate, who have power over the money, liable for the duty. It was recently decided in this Court, in the case of *The Attorney-General v. Jackson (a)*, that the trustees mentioned in that act of Parliament must be trustees having power over the fund, trustees having power to retain. In the 55 *Geo. 3*, the act of Parliament under which the Crown is seeking to recover the duty, there is no such provision.

(a) 2 Cr. & J. 101.

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By the schedule to that act it is clear, that the case now before the Court does not come within it. It is—"For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person who shall have died after the 5th of *April*, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged after the 31st *August*, 1815." It is quite clear, that the disposition in question does not fall within this schedule; for it is not a disposition out of Mrs. *Cholmondeley's* personal or moveable estate, nor is it chargeable on her real estate. Supposing, then, that the Crown could have recovered this duty under the former acts, still it is submitted that the duty is not payable under the 55 *Geo. 3.* [Lord *Lyndhurst*, C. B.—The duties imposed by the 45 *Geo. 3.* are repealed; and the words which might have imposed a duty in a case like the present are omitted in the 55 *Geo. 3.*] The duties are repealed, and there is a new schedule, and the former words applicable to the present case are omitted. [Lord *Lyndhurst*, C. B.—May they not have been omitted from the supposition that they are unnecessary; that the other words which remained were sufficiently strong to import the same thing?] It is clear that this case does not come within the words of the 55 *Geo. 3.* That act cannot apply to an instrument of this nature, which is merely the execution of a power; for the will is not the instrument under which the property is taken. It is under the marriage settlement that the money gets into the hands of the persons designated by Mrs. *Cholmondeley*.

It is submitted, therefore, that the Crown is not entitled to legacy duty on this fund, which passes, not by a testamentary gift, but under a marriage settlement; the legis-

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lature having provided no mode of enforcing such duty, and the schedule of the 55 *Geo. 3*, containing no description applicable to this case.

The *Solicitor-General, Amos*, and Sir *George Grey*, for the Crown.—The question is, whether the sums given by this testamentary instrument, executed by the late Mrs. *Cholmondeley*, are legacies within the meaning of this act of Parliament. It is admitted, that the Crown can have no claim, unless it appear that this is a testamentary instrument of the nature which the statute requires; and the next question will be, supposing this is a testamentary instrument, whether it is to be considered to be a will giving a part of the property; or whether it is to be considered to be an execution of a power of appointment, which the statutes allude to; which, if it is, it is just as good for this purpose as if it were a testamentary instrument in the strictest sense of the word.

A distinction has been taken between that which is the property of the testator, and that which is not. But the statute 36 *Geo. 3*, clearly imposes a duty upon property, which, taken *per se*, is not the personal estate of the testator; and under an instrument, which, taken *per se*, is not by general law merely the will of the testator. This act is quite in force with respect to the body of the act, though varied in respect of the schedule of duties. And it is submitted that those words, so much relied on, to be found in the schedule of the 55 *Geo. 3*, ought not to have such a limited interpretation as to exempt the sums given by this testamentary instrument from duty. The 36 *Geo. 3*, c. 52, s. 2, imposes duties on legacies in these words:—"Be it further enacted, that upon every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or more, given by any will or testamentary instrument of any person who shall die after the passing of this act, out of the personal estate of the person so dying, and also upon the clear residue and upon every part of the clear residue

of the personal estate of every person who shall so die, whether testate or intestate, and leave personal estate of the clear yearly value of 100*l.* or upwards, which shall remain after deducting debts, funeral expenses, and other charges, and specific and pecuniary legacies (if any), whether the title to such residue, &c." The words which follow are not material, but the legacy is described as being paid out of the personal estate of the person dying; and, at the end of that section, there are exemptions in favour of legacies in certain cases, by the husband to the wife, or the wife to the husband, or any of the Royal Family. The enacting clause of this act imposes the duty in precisely the same terms as the schedule of the 55 *Geo.* 3. Now the seventh section of the 36 *Geo.* 3, c. 52, explains more fully upon what legacies the duty is intended to be imposed, and is a legislative exposition of the meaning of the words 'legacies out of the personal estate,' which had been used in the second section. The seventh section explains that the legacies intended to be made subject to the duty, are not only those which are payable out of the personal estate, strictly so called, of the person dying, but those which are payable out of the personal estate of which the party had the power to dispose. In all the schedules which have been introduced into the various acts, the legacy is stated as payable out of the personal estate of the party so dying, and must be understood in all of them in the sense in which it is explained in the seventh section of the 36 *Geo.* 3. In this sense it must be understood in the schedule of the 55 *Geo.* 3. [*Bayley*, B.—The 44 *Geo.* 3, c. 98, imposed a duty in this manner—"Legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or more, given by any will or testamentary instrument of any person out of his or her personal estate." That contains one of the branches, but not both; the one being, out of his or her personal estate, the other, out of any personal estate over which he has the power of disposition.] The general description did in fact include legacies out of the

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personal estate, over which the party had a power of disposition. The seventh section does not make a new enactment, but only defines what is meant by the words 'not only the personal estate of the party, but that over which he had a power of disposition.' The seventh section defines what is meant by the terms in the second section. The clause at the end of the second section, exempting a legacy from a wife to her husband from the duties, appears to confirm the view taken of the 36 Geo. 3. A wife could leave the legacy only by means of a power; and it is clear, therefore, that the legacy left by a wife to her husband would have been liable to duty but for that clause; and that the act, therefore, included legacies left by virtue of a power, that it included legacies left by married women under a power. In the schedule to the 55 Geo. 3, we find precisely the same exemption.—“Legacies and residues, or shares of residue, of any such estate or effects as aforesaid, given or devolving to or for the benefit of the husband or wife of the deceased, or to or for the benefit of the Royal Family.” [*Bayley, B.*—That may mean a legacy devolving to the wife from the husband, or to the husband from the wife.] It seems, from the words of the former act being the same as in the 55 Geo. 3, that they include the disposition by a wife to her husband, and, therefore, a legacy left like that of *Mrs. Cholmondeley*. If that construction is right, the seventh section must be taken as explanatory; and the argument founded on this not being strictly personal estate of the deceased falls to the ground, for it is personal estate of which *Mrs. Cholmondeley* had the disposition.

But the words in the 55 Geo. 3, “his or her personal estate,” are ample enough to include this 20,000*l.* which was settled by Sir *Philip Francis*, the father of *Mrs. Cholmondeley*. The object was to provide for her for her life; to provide for the issue of the marriage, if there should be any; and, subject to that object, the parties are to let this 20,000*l.* be considered absolutely the property

of Mrs. *Cholmondeley*. As, by law, a married woman can have no personal property, nothing can be more common, than when the property comes from the wife (which it appears in this case to have done), to give to the wife a power in a circuitous way to dispose of it, making it her personal estate after her death without issue. It is subject to any testamentary disposition she might make of it. The person entitled under the will of Mrs. *Cholmondeley*, if his legacy were not paid, might file his bill, not against the trustees, but against the executor or administrator of Mr. *Cholmondeley*, as he died without proving her will. This is the true answer to the objection urged on the other side, that these trustees could not be compelled to come before the Court. It may be true, that the Crown has no remedy against them, and that the only remedy is against the executors in case the legacy duty be not paid. The trustees are not bound to pay the legacy duty; all they have to do is to pay over the money to the executors. [Lord *Lyndhurst*, C. B.—How are the executors to get the money from the trustees?] By a bill in *Chancery*, praying that the trusts of the settlement may be executed. The trustees are bound to pay the property to the parties legally entitled to it at their hands, that is, to the persons taking probate of the will, or taking out administration, owing to the executor having died without so doing. Sir *E. Sugden*, in his *Treatise on Powers*, p. 337, states in substance, that a will executed by a married woman under a power of this kind, is altogether analogous to a will executed without such power. No use can be made of the will, or benefit taken under the appointment, until the executor clothes himself with the legal character, and becomes intitled by the probate to claim the personal estate. The executor, and not the legatee, is the party to sue; and the executor must go against the trustee just as he would against any debtor to the estate.

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The judgment of the Court was now delivered by—

Lord LYNTHURST, C. B.—This question arises out of the act imposing duties on legacies; the facts of the case were these: Upon the marriage of Mrs. *Cholmondeley*, the sum of 20,000*l.* was vested in trustees, upon trust, as far as related to the income arising out of that money, to her father for life, and to her husband for life, and in the event of her surviving, to her for life, and in the event of her having no children, with a power to her to appoint that sum of money; the result was, she had no children, and she made a testamentary appointment conformably to the authority thus given. The question is, whether the money taken under that testamentary appointment is subject to the legacy duty imposed by the 55 *Geo. 3*, c. 184. In the schedule to that act the duty is imposed upon every legacy payable out of the personal estate of the testator. It was contended at the bar, that this was not a legacy payable out of the personal estate of the testator; and that it did not come, therefore, within the words or within the meaning of the act, and that the duty, therefore, was not payable. In order to come to a right conclusion upon this subject, it is necessary to advert to the previous acts imposing duties upon legacies; the three first, the 20 *Geo. 3*, c. 28, the 23 *Geo. 3*, c. 58, and the 29 *Geo. 3*, c. 51, impose the duties upon a receipt or acquittance given upon the payment of legacies left by any will, in general terms, leaving the Court to define what was meant as a legacy within the meaning of the act of Parliament. The next act, namely, the 36 *Geo. 3*, c. 52, in the clause imposing the duty, enacts, that the duty shall be payable upon all legacies paid out of the personal estate of the testator; but in the seventh section of that act, there is a declaration of the legislature, as to what is to be deemed a legacy within the meaning of the act. By the seventh section it is enacted, that all gifts payable out of the personal estate of the testator, or out of the personal estate which the testa-

tor has the power of disposing of, shall be deemed and considered a legacy within the meaning of the act of Parliament. The legislature, therefore, in the act itself, interpreted and defined what is meant by a legacy payable out of the personal estate. The next act is the 44 Geo. 3, c. 98; in that act there is no section or provision corresponding with the provision to which I have adverted in the 36 Geo. 3, describing what the legislature meant by the term "legacy" within the meaning of that act. However, if the question had arisen upon the 44 Geo. 3, I should have been of opinion, that as the legislature had in the previous act defined what is meant by the term legacy, it would be considered that the legislature used the term (the act being passed *in pari materia*) in the same sense, and to the same extent in which it had used it in the previous act; and it appears to me obvious that this must have been the meaning of the legislature, because the object of the act of the 44 Geo. 3, was to consolidate the regulations and provisions of the previous act, and to consolidate the duties. There is no intimation whatever in the 44 Geo. 3, that there was any intention to reduce the duties; that leads, therefore, I think, fairly to the conclusion that the legislature would not have intended, under the term "legacy," to give a more limited meaning to that term, than it had in the 36 Geo. 3.

We are led to the same conclusion by the consideration of the 45 Geo. 3, c. 28, which was passed in the following year. By the 45 Geo. 3, the duty is made payable upon legacies out of any real or personal estate of the testator. In the 45 Geo. 3, there is a clause similar to the seventh sect. of the 36 Geo. 3, defining what the legislature meant by the term "legacies," and in that description it states, that any gift payable out of the personal estate, or out of any personal estate which the testator has the power of disposing of, shall be considered a legacy within the meaning

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of that act. So that, under the 36 *Geo. 3*, and under the 45 *Geo. 3*, the legislature has distinctly defined what is meant by the term "legacy," and it seems impossible to come to a conclusion, that, in the intermediate act of the 44 *Geo. 3*, it intended to give a different interpretation to the term, or that it should have less effect than in the previous and subsequent acts. I should think, therefore, it is perfectly clear, under the 44 *Geo. 3*, that the term "legacy," meaning any legacy payable out of the personal estate of the party deceased, would not only extend to a legacy properly payable out of the personal estate, but a legacy payable out of any property which the party had the power of disposing of by will. If that be so, the language of the 48 *Geo. 3*, is the same in substance as that of the 44 *Geo. 3*; and the language of the 55 *Geo. 3*, is the same as that of the 48 *Geo. 3*.

Taking all the acts together, therefore, applicable to the same subject, and passed *in pari materia*, and the legislature in the 36 *Geo. 3*, and the 45 *Geo. 3*, having described and defined what they meant by a legacy, and having given no such description as to the intermediate act of 44 *Geo. 3*, but it being obvious what their meaning was with respect to the act, it seems impossible to come to a conclusion that they meant to use that term in a more limited sense in the 48 *Geo. 3*, and the 55 *Geo. 3*. If that be the true meaning of the act of Parliament, it will follow, that, under the 55 *Geo. 3*, the duty would be payable, not only upon a legacy payable out of the personal estate, strictly considered, of the testator, but out of any personal estate which the testator had the power of disposing of, as he or she may think proper. That would apply to the present case. We are of opinion, therefore, that, considering all the acts together, the duty is payable in respect of this property, which was taken by the appointees under the will of Mrs. *Cholmondeley*.

Rule absolute.

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WARD and Others v. SWIFT and Others.

THIS was an issue out of the Court of *Chancery*; after the trial whereof, the following case was stated for the opinion of this Court.

By indentures of lease and release, bearing date respectively the 9th and 10th days of *November*, 1795, made between *Samuel Bladen* and *Martha*, his wife, of the first part; *Thomas Randall Swift* and *Mary*, his wife, of the second part; and *Thomas Finch*, of the third part; reciting an agreement for the sale by the said *Samuel Bladen*, to the said *Thomas Randall Swift*, of all that site of the manor-house, &c. &c.

It was witnessed, that, in consideration of the sum of 1,400*l.* paid by the said *Mary Swift*, with her own separate money, with the privity, consent, and concurrence of the said *Thomas Randall Swift*, testified by his being a party thereto, and 5*s.* by the said *Thomas Finch*, paid to the said *Samuel Bladen*, he the said *Samuel Bladen* conveyed the said premises to the said *Thomas Finch*, and his heirs, To the use of such person or persons, and for such estate or interest, estates or interests, upon such trusts, and to such uses, intents, and purposes, and with, under, and subject to such powers, provisoes, directions, limitations, contingencies, charges, conditions, and restrictions, and in such manner and form as the said *Mary Swift*, at any time or times thereafter during the term of her natural life, by any deed, instrument, or writing, deeds, instruments, or writings, either with or without power of revocation and new appointment, to be by her duly executed under her hand and seal, in the presence of, and to be attested by two or more credible witnesses, or by her last will

By indentures of lease and release, certain premises were conveyed to *A.* and his wife, after other uses, to such uses as *M. S.*, by her last will and testament in writing, or any instrument in writing in the nature of, or purporting to be, her will, or by any codicil to be by her duly executed and published under her hand and seal, in the presence of and attested by three or more credible witnesses, notwithstanding her coverture, &c., should direct, limit, or appoint, &c.

M. S. signed, sealed, and delivered, as and for her last will and testament, an instrument which concluded and was attested as follows:—"In witness whereof I have set my hand and seal hereto, this 5th day of *August*, A. D. 1801, in the presence of the underwritten—*Mary Swift.* (L. S.)

—Signed, sealed, and delivered this 5th day of *August*, 1801, as the last will and testament of the said testatrix *M. S.*, who, in her presence, and in the presence of each other, have put our names as witnesses thereof. *H. F.—J. G.—R. F.*" Held, that the power was well executed.

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and testament in writing, or any instrument in writing, in the nature of or purporting to be her will, or by any codicil *to be by her duly executed and published under her hand and seal, in the presence of, and to be attested by, three or more credible witnesses,* notwithstanding her coverture with her then present or any future husband, and whether married or sole, should direct, limit, or appoint, give or devise the said site of the said manor, and the said messuages, lands, tenements, closes, grounds, hereditaments, and premises thereby granted and released, or expressed or intended so to be, or any of them, or any part or parcel thereof; and for want or in default thereof as to the whole of the said premises, such of them, or such part or parts, or so much thereof of which no such direction or appointment, devise, or disposition, should be made; and if any such should be made, and it should be in any respect defective or incomplete, as and when the estate, right, or interest thereby limited, appointed, devised, or disposed of, should be made and take effect, To the use of the said *Thomas Finch* and his heirs for and during the term of the natural life of the said *Mary Swift*, upon trust for her, and to authorize, and empower, and permit and suffer her, from time to time during her life, to receive and take the rents and profits of the said premises, and that her receipt or receipts, notwithstanding her coverture, should be effectual discharges for the same; and after the death of the said *Mary Swift*, and in default of such appointment or devise made by her in pursuance of such power, To the use of *Thomas Randall Swift*, his heirs and assigns for ever. Proviso, that the monies arising from any sale, mortgage, &c., should be paid to the said *Mary Swift*, or such person or persons as she should direct or appoint, and the same disposed of as she should think fit, direct, or appoint, or otherwise the same should be invested in mortgage, government, or other security or securities, in the name of the said *Thomas Finch*,

upon trust to permit the said *Mary Swift* to receive the profits. *Exch. of Pleas,*
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The said *Mary Swift*, on the 5th *August*, 1801, signed, sealed, and delivered, as and for her last will and testament, an instrument which concluded and was attested as follows:—

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In witness whereof I have set my hand and seal hereto, this 5th day of *August*, A.D. 1801, in the presence of the underwritten,

Mary Swift (L. S.)

Signed, sealed, and delivered this 5th day of August, 1801, as the last will and testament of the said testatrix, Mary Swift, who, in her presence, and in the presence of each other, have put our names as witnesses thereof.

Henry Francis.

John Garnham.

Ruth Francis.

The issue was tried at the Spring Assizes for the county of *Kent*, 1832, before the Lord Chief Justice of the Court of *Common Pleas*, when the jury found that the said testatrix, *Mary Swift*, was, on the 1st day of *August*, 1801, of sound mind; and that she signed, sealed, and delivered the said instrument, as her last will and testament, in the presence of the three witnesses attesting the execution thereof.

The question for the opinion of this Court was, whether the will of *Mary Swift*, dated 5th day of *August*, 1801, was a due execution of the power which she had under the deed of the 10th day of *November*, 1795.

Hutchinson for the plaintiff.—The will was a proper execution of the power. There is no authority for saying that the word ‘published’ is necessary in the attestation.

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That word is not to be found in the Statute of Frauds. It is true, that the words of the power in this case are "to be published, &c.," and therefore, we must inquire what that word means; but the word itself need not be used in the attestation. In *Moody v. Reid* (a), Lord Chief Justice Gibbs says—"I called on the bar to say, what publication was. I do not wonder that I had no answer; for, though the parties use the term 'publication,' it is a term in this sense unknown to the law;" and afterwards the same learned Judge said—"I can only suppose it to be that by which a person designates that he means to give effect to a paper as his will." By the signing, sealing, and delivery, here, the testatrix clearly designated that she meant to give effect to this instrument.

But, it will also be said, that it does not appear on the face of the attestation, by whom the will was published. The words "as witnesses thereof," clearly imply this—as witnesses of what goes before. What is that? Why, the signing, sealing, and delivery, as the last will and testament of *Mary Swift*, who, in her presence, and in the presence of one another, have put our names, &c.

In *Stanhope v. Keir* (b), the publication was required by the instrument creating the power to be attested; and the witnesses merely subscribed their names after the words, "in the presence of," which clearly was not a sufficient attestation. [Lord Lyndhurst, C. B.—Will it be contended, that delivery, as a last will and testament, is not a publication? In *Stanhope v. Keir*, the signing and publication were required to be attested, and there was no attestation thereof.]

Platt, contra.—The attestation was insufficient to support the alleged execution of this power. The object of the party who created this power was, to prevent the person having

(a) 7 Taunt. 355.

(b) 2 Sim. & St. 37.

the power from the rash execution of an instrument, which was to pass the property from the heir-at-law. Even where the ceremony is merely immaterial, it must, however, be strictly complied with in executing a power of appointment. *Hawkins v. Kemp* (a). [Lord *Lyndhurst*, C. B.—There is no doubt that all things required by the creator of the power must be complied with, though not essential to such an instrument.] Then, here the instrument creating the power, as far as relates to an execution by will, requires that the will should be “by her duly executed and published in the presence of, and attested by, &c.” Now, there is no attestation of the publication by her. It might, consistently with this attestation, have been published by any one else in her name. The saying, that it is delivered as her will, &c., does not necessarily imply that it is done by her.

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It does not appear even to be signed by the testatrix; for the attestation does not state by whom it is executed. It might, consistently with this attestation, have been signed by a third person in another room, and afterwards brought into the room, and acknowledged by her in the presence of the witnesses, who might attest it in her presence. It need not now be argued that such a defect cannot be supplied by parol (b).

If the publication does not appear on the attestation, it is clearly bad. Stress has been laid on the word “thereof,” but that word does not assist the plaintiff, because there is no person mentioned before as having signed or executed.

But, *secondly*, there is no attestation of any publication in this case. Publication is something different from delivery. [*Bayley*, B.—Supposing that publication does mean something more than a mere delivery, you do not

(a) 3 East, 443, Lord *Ellenborough's* judgment.

(b) See *Doe v. Pearce*, 6 Taun-

ton, 402, referred to by *Bayley*, B., on this point, in the course of the argument.

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take the whole of the expression, it is "as her last will and testament." But, on the other point, suppose that she had signed and sealed the instrument in her own bed-room, and afterwards acknowledged it in the presence of the witnesses, would that have done? It would not be a sufficient attestation of execution and publication under this instrument, though it might have been sufficient to satisfy the provisions of the Statute of Frauds, which does not require the *publication* to be attested. In the case of a power, the act of signing must be gone through. [*Bayley, B.*—Under the Statute of Frauds the signature of a third party, by the direction of the testator, may be sufficient.] An acknowledgment of the signature is sufficient, as far as regards the Statute of Frauds (*a*). [*Lord Lyndhurst, C. B.*—The difficulty is, whether this attestation imports that this will was signed, sealed, and delivered, in the presence of the witnesses. Might not they, in the words of the attestation, be "witnesses thereof," if it had been acknowledged in their presence. They would be witnesses of the signing if acknowledged, and of the sealing if acknowledged; it is to be duly executed under her hand and seal, and attested. Would an acknowledgment of her hand and seal satisfy that provision? *Bayley, B.*—Must not your attestation reach all that the witnesses are required by the instrument creating the power to attest?]

Hutchinson was heard in reply.

[*Lord Lyndhurst, C. B.*—The words "duly executed" would not require a seal. This instrument points out a mode of execution which the Statute of Frauds does not require.

Suppose, in point of fact, this will had been signed and sealed at a prior time in another room, and had been acknowledged in the presence of three witnesses, would not

(*a*) 3 Stark. Ev. 1686; 1 Ves. & B. 362; Chitty's Stat. 1126.

that state of facts correspond with this attestation? It is clear law that the arbitrary forms required by the creator of the power, though totally unimportant as to the validity of the instrument, must be observed. The words are, "duly executed and published under her hand and seal, in the presence of, and to be attested by &c.;" and we are to see that this form has been observed.

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Bayley, B.—Suppose this will had been signed by a third party, by the direction of the testatrix, in her presence, according to the provisions of the Statute of Frauds, could that be said to be a good execution of this power?]

Lord LYNDHURST, C. B.—We will consider this case and send our certificate.

The following certificate was afterwards sent:—

We have heard this case argued by counsel, and are of opinion that the will of *Mary Swift* was a due execution of the power which she had under the deed of the 10th of *November, 1795*.

LYNDHURST.
J. BAYLEY.
W. BOLLAND.
J. GURNEY.

TOWNSEND *v.* BURNS (*a*).

ASSUMPSIT on an agreement. The defendant suffered judgment by default, and a writ of inquiry having been executed before the Sheriff of *Middlesex*, judgment

Defendant suffered judgment by default.
Plaintiff executed a writ of inquiry in vacation and signed

judgment, and took defendant in execution. The Court compelled the plaintiff's attorney to file the inquisition and subsequent proceedings.

In *assumpsit* on an agreement, whereby plaintiff agreed to procure a lease to be granted to defendant, and defendant agreed to pay the plaintiff, his solicitor, or agent, on request, the sum of 25*l.* in full for his share or proportion of the costs and expenses of the agreement, and of the lease: *Held*, that the declaration was good without an averment that any costs or expenses had been incurred.

(*a*) 2 C. & J. 468.

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was signed therein in vacation, under the provisions of the 1 *Will.* 4, c. 7, s. 1; and the defendant was taken in execution.

Mansel, on a former day in this term, obtained a rule to shew cause, why the plaintiff's attorney should not file the writ of inquiry and subsequent proceedings, in order that the same might be read on a motion to vacate the judgment, and enter an arrest of judgment under the fourth section of the above act, and why the plaintiff's attorney should not pay the costs. This motion was made on an affidavit, stating, that the writ and subsequent proceedings had not been filed, and that the plaintiff's attorney had refused to file them, on application being made to him for that purpose.

The affidavits in opposition stated, that the deponent had inquired of a clerk in the *Exchequer* office, as to the practice; and that he had informed him that it was not customary to file inquisitions on writs of inquiry, but to deliver them over to the plaintiff; and that there was no file in the office for such inquisitions. The affidavit also stated, that the deponent had been informed, and believed, that, from the year 1817, it had never been the practice to require writs of inquiry, and inquisitions taken thereon, to be filed.

Alexander shewed cause, relying on this affidavit, and submitted, that there was no necessity to file the inquisition for the objects stated on the part of the defendant, as he had had an opportunity of obtaining the requisite information at the time of the execution of the writ of inquiry; and that, at all events, the attorney ought not to pay the costs of that motion, as there had been no application made to him for a copy by the defendant.

Lord LYNDBURST, C. B.—The defendant is entitled to

have the inquisition filed for the purpose of taking any objection to which it may be open. It was the duty of the plaintiff's attorney to have filed it. The officer of the Court informs us, that there is a regular file, and a regular fee taken for the filing of inquisitions. The plaintiff's attorney refused, on application, to file the inquisition, and he does not even say at that time that the party applying may look at it.

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BAYLEY, B.—The defendant has a right to have an opportunity of seeing the inquisition in order to see whether the judgment can be arrested or vacated. When application was made to the plaintiff's attorney to file the inquisition, he might have shewn it, or have allowed the party to take a copy of it.

Rule absolute, with costs to be paid by the plaintiff's attorney.

Upon the inquisition and proceedings being filed in pursuance of the above rule, it appeared that the first count of the declaration was upon an agreement, whereby the plaintiff agreed to procure a lease of certain premises to be granted to the defendant, and the defendant undertook to accept the lease and execute a counterpart, and to pay the plaintiff, his solicitor or agent, on request, the sum of 25*l.* in full, for his share or proportion of the costs and expenses of preparing and executing the agreement, or in relation thereto, and also of or occasioned by the preparing and carrying into effect such lease and counterpart; which said lease and counterpart should be prepared by the solicitor of the plaintiff. The plaintiff then averred, that he did cause and procure the lease to be granted, and that the said lease was prepared by

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the solicitor of the said plaintiff; and although the defendant did accept the said lease, and execute a counterpart thereof, yet, that the defendant, although requested, did not nor would pay the said sum of 25*l.* in full for his share of the costs and expenses aforesaid, or any part thereof.

Mansel now moved, on production of the rule, to vacate the judgment and enter an arrest of judgment. He objected, that the declaration did not contain any allegation, that any costs and expenses had been incurred, and that, without such allegation, the Court could not conclude that any were incurred. That it was necessary to aver, that costs and expenses had been incurred in preparing the lease, &c., and the amount of them, and that the defendant had had notice, as the acts were to be done by a third party. In support of this objection, he relied on *Foxe v. Goodson* (a), where it was held, that the defendant might have demurred to a declaration in *assumpsit*, on a promise to assign a lease and pay costs of suit, because it did not state what costs he had expended.

BAYLEY, B.—I think the case in *Cro. Eliz.* is perfectly distinguishable from the present case. That was an agreement to pay costs of suit generally, and not a fixed sum; and therefore it was necessary there, that the costs should be first ascertained before they could be recovered; and, as the declaration did not allege that they had been ascertained, it was clearly bad on demurrer. In this case, there is an agreement by which a lease was appointed to be executed, and in the preparing of which some costs and expenses would necessarily be incurred, and the defendant makes a stipulation that he shall only be liable to a given extent, and so far he will be liable. I con-

(a) *Cro. Eliz.* 276.

sider this not an agreement to pay an amount thereafter to be ascertained, but an agreement that he will pay to the amount of 25*l.*, as an amount liquidated, ascertained, and settled between the parties.

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BOLLAND, B.—It is clear, from this declaration, that expenses must have been incurred, and the defendant expressly agrees to pay this sum of 25*l.* for his share of those expenses. That is the amount liquidated.

GURNEY, B., concurred, and the rule was—

Refused.

Archbishop of CANTERBURY v. ROBERTSON.

DEBT on the usual administration bond against the surety. Plea—*non est factum*; whereupon the plaintiff joined issue, and suggested upon the roll several breaches of the bond.

Hoggins moved for a rule to shew cause why some of the breaches should not be struck out, or why the defendant should not be allowed to suffer judgment by default, and pay one shilling damages thereon.

The affidavit, upon which the motion was made, stated that a general order to put the bond in suit had been obtained from the Prerogative Court, solely on the ground that the principal had not paid over the residue; that application had been made to the Prerogative Court to rescind the general order, and to limit the permission to sue to the breach for non-payment of the residue, but that the Judge of that Court thought that he could not interfere.

A party had obtained from a Prerogative Court a general order to put an administration bond in suit against the surety, on the sole ground that the principal had not paid over the residue. On *non est factum* being pleaded, the plaintiff suggested breaches, not only for not paying over the residue, but on several other distinct parts of the condition. This Court refused to compel him to strike out the breaches on the other parts of the con-

dition, or to allow the defendant to let judgment go by default, and pay nominal damages on those breaches.

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BAYLEY, B.—A general order for putting the bond into suit has been obtained, and I do not see how we can restrain a party so empowered to sue from suggesting as many breaches as he chooses. If not suggested now, they could not be suggested afterwards. I know of no instance where, on *non est factum* pleaded, and a suggestion of breaches entered on the roll, the defendant has been allowed to let judgment go by default. In the present case, the action is brought on a bond conditioned to perform certain acts. The defendant has pleaded *non est factum* merely, and the plaintiff has thereupon suggested breaches under the statute. On that suggestion, the jury are to inquire into the truth of the breaches; and I am aware of no case where a party has suffered judgment by default on such breaches; and it seems to me contrary to the provisions of the statute that he should do so.

The rest of the Court concurred, and the rule was—

Refused.

ANDERSON v. CALLOWAY.

A sheriff is not entitled to relief under the Interpleader Act, 1 & 2 Will. 4, c. 58, s. 6, where he has paid over the proceeds of the execution to the judgment creditor.

THE sheriff of *Middlesex* having been ruled to return the writ of *venditioni exponas* in this case, on the 16th of *June* last, sold the goods of the defendant; and on the 20th of *June*, after having received notice of the defendant's bankruptcy, paid over the money to *Kinnear*, the judgment creditor.

Holt, on a former day in this term, obtained a rule on the part of the sheriff, under the Interpleader Act, 1 & 2 W. 4, c. 58, s. 6, calling before the Court the judgment creditor and the assignees of the bankrupt.

Follett, for the assignees, now shewed cause, and con-

tended, that, as the sheriff had paid over the proceeds of the sale under the execution, the act did not apply; and that the rule ought to be discharged with costs.

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Holt, contra, contended, that the sixth section applied generally to all cases where goods were taken in execution, and any claim was made to them by a third party, the words being "where any such claim shall be made to any goods taken in execution under any process, or the proceeds or value thereof," differing from the first section in this, that nothing is said about collecting or being ready to bring the money into Court.

LORD LYNDRHURST, C. B.—The object of the act of Parliament was to afford relief to the sheriff, where two parties were claiming the property, and he had either the goods or the money in his possession; not to a case where he had paid over the money to one of the parties. The condition in the first clause is, that the party does not collude, and is ready to bring the money into Court. The words are, "that such defendant does not in any manner collude with such third party, but is ready to bring into Court or to pay or dispose of the subject-matter of the action, in such manner as the Court (or any Judge thereof) may order or direct." The obvious meaning of that clause is, that the party applying has got the property in his possession, in respect of which he is sued, and to which he claims no right; and I think that this clause governs the whole act.

BAYLEY, B.—The act does not apply to such a case as this, where the sheriff has paid over the money; the "powers and authorities" to be exercised by the Court for the relief of the sheriff are expressly, in the sixth section, stated to be such "powers and authorities as in that act are before contained," which renders it necessary to refer to the preceding sections to ascertain the extent and

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application of those powers and authorities. Then one condition in the first section is, that the party applying for relief shall be ready to bring the subject-matter of dispute into Court, or to dispose of it as the Court shall direct.

BOLLAND, B., and GURNEY, B., concurred, and the

Rule was discharged with costs.

RUSSELL v. HURST.

A defendant under terms to plead issuably may move to change the venue, if the Judge's order is not "on all the usual terms."

IN this case the defendant had obtained a Judge's order for time to plead, on the terms of "*pleading issuably*."

W. H. Watson moved to change the venue from *Lancashire* to *Yorkshire*, on the usual affidavit. He mentioned the cases of *Waring v. Holt* (a), and *Brettargh v. Dearden* (b), in this Court, where the Court refused to change the venue, when the defendant had obtained an order for time to plead "on all the usual terms;" one of which, according to these cases, was not changing the venue. But he contended that these cases did not apply where the defendant was only under terms to plead issuably; and he cited *Tidd's Practice*, 608, to shew, that in the *King's Bench* the venue might be changed when the defendant was only under terms of pleading issuably.

LORD LYNDRHURST, C. B.—One of "all the usual terms" in this Court is, that of not changing the venue; but a defendant is not prevented from changing the venue when he is merely under terms to plead issuably.

The other Judges concurred.

Rule granted (c).

(a) 3 Price, 3.

(b) M'Clel. & Y. 106.

(c) See *Notts v. Curtis*, 2 C. & J. 345.

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WARD v. BATEMAN.

CASE for an injury to the plaintiff's reversionary interest. Pleas—*First*, the general issue—*Secondly*, that the grievances complained of in the declaration were acts done by the defendant in the execution of his office, as a surveyor of the highways, and a tender of the sum of 5*l.*, as amends for the injury the plaintiff had sustained, under the 79th section of the 13 *Geo.* 3, c. 78.

A surveyor of highways is not entitled to treble costs under the 13 *Geo.* 3, c. 78, s. 81, upon a verdict found for him.

The cause was referred to arbitration, and the arbitrator found that damage to the extent of 5*l.* had been done to the plaintiff's reversionary interest, but that the acts which occasioned the damage had been done by the defendant in the execution of his office, as a surveyor of the highways. He then awarded that a wall should be built by the defendant, and directed a general verdict to be entered for him.

Upon the taxation of costs, the Master allowed the defendant single costs only, upon which—

Humfrey obtained a rule to shew cause why the Master should not review his taxation, on the ground, that the defendant was entitled to treble costs, pursuant to 13 *Geo.* 3, c. 78, s. 81.

Adams, Serjt., and *Amos*, shewed cause.—The question is, whether the defendant is entitled to treble costs under the statute, where he pleads a special plea and a verdict is found for him. The 81st section, which gives treble costs, enacts, "that if any action or suit shall be commenced against any person for any thing done in pursuance of this act, the defendant shall and may plead the general issue, and give the special matter in evidence;" and if it shall appear to have been an act done in pursuance of the act, the jury shall find a verdict for the defendant: it then

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provides, in a subsequent part of the clause, that the defendant shall and may recover treble costs. A party, to entitle himself under this section, must bring himself within the express words of it. This case is neither within the words or the meaning of the act; for, here, the defendant has pleaded a special plea. There is good reason for this limitation, because a plea of tender of amends admits some wrong committed by the defendant, and shews that he has not been harassed without a cause. The words of the statute, however, appear to be confined to cases of nonsuit, discontinuance, and judgment on demurrer, and cannot be construed to extend to a verdict. This provision as to treble costs is in the nature of a penalty, and, therefore, the act in that respect ought to be construed strictly. The language of this statute resembles that of the 22nd section of the 11 *Geo.* 2, c. 19, which, it has been held, ought to be construed strictly. *Gurney v. Bullen* (a). In the 7th *Jac.* 1, c. 5, the 14 *Geo.* 3, c. 79, s. 100, and the Turnpike Act, 3 *Geo.* 4, c. 126, s. 147, the Legislature have provided in express terms for those instances in which treble costs shall be recovered on a verdict found for the defendant, from whence it may be inferred, that, as in this statute it is not so provided, the Legislature did not intend that treble costs should be recoverable.

Goulburn, Serjt., and Humfrey, contra.—This act, being in protection of public officers, must be construed liberally, according to the principle adopted in *Pratt v. Hilman* (b). The provision as to treble costs ought not to be limited in the manner contended for on the other side, but may be divided into two branches, the one applicable to the cases mentioned in the latter part of the section, the other to the case where the jury shall find a verdict for the defendant by reason that the act complained

(a) 1 B. & A. 670.

(b) 6 D. & R. 481.

of has been done under the authority of the statute, or that the action has been brought after the time limited, or in a wrong county.

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BAYLEY, B.—If the Legislature intended to give treble costs on a verdict found for the defendant, the language used to express that purpose is very unfortunate. What are the words relied upon to lead to the inference that such was the intention of the framers of this clause? It is provided, that, if the fact committed “shall appear to have been so done, (that is, in pursuance of the act), or if any such action or suit shall be brought after the time limited for bringing the same, or be brought or laid in any other place than as aforementioned, then” (let us see what is to be the consequence), “the jury shall find for the defendant or defendants.” This is a termination of that sentence, and we then come to a new alternative, “or if the plaintiff or plaintiffs shall become nonsuit, or discontinue his or their action, after the defendant or defendants shall have appeared, or if, upon demurrer, judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall and may recover treble costs.” Therefore, having in the former sentence disposed of the case of a verdict, the clause goes on to provide that treble costs shall be recoverable in three cases, and in three cases only. There might be good reasons to omit the case of a verdict, but whether there were or not, I cannot say that an intention to give treble costs in that event can be collected, when I find that in other acts of Parliament such an intention has been clearly and unequivocally declared by express words.

BOLLAND, B.—The object of the Legislature, in framing this section, was to protect a public officer so far as he has a right to be protected. I can perceive good grounds to distinguish the three cases in which they have declared

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that the defendant shall have treble costs, from the case of a verdict, which is omitted. In case of a nonsuit or discontinuance, the plaintiff has no ground of action, and a judgment in demurrer shews that he is wrong in law; but where the action goes on to a verdict, there generally has been some question to be tried.

Rule discharged.

GRAHAM v. WHICHELO and HULL.

W. & H. by agreement in *March*, 1827, became tenants to the plaintiff for three years, of premises occupied by them as partners, with the power to them to extend the term to seven years, by giving the plaintiff a notice to that effect. In *January*, 1829, *W. & H.* gave notice accordingly. At *Midsummer*, 1828, *W.* retired from the partnership, and in *January*, 1829, *H.* entered into partnership with *S.*, and *H. & S.* carried on the business under the firm of *H. & S.* until 1831.

Plaintiff gave receipts for the

rent as received from *H.* after *W.* retired, and as received from *H. & S.* after *S.* became partner with *H.* In *February*, 1829, the plaintiff gave to *H.* a letter to the plaintiff's attorney, signifying, that a lease might be made to *H. & S.*, but this letter was kept by *H.* and not acted upon, and no lease was prepared:—*Held*, that *W.* remained liable to the plaintiff for the rent accruing in 1831.

ASSUMPSIT upon an agreement, dated the 10th *March*, 1827, between the plaintiff, of the one part, and the defendants, of the other part, whereby the plaintiff did agree to let and demise unto the defendants a part or portion of a certain messuage or dwelling-house, with certain rights, privileges, &c. in the said agreement mentioned, to hold the same from the 25th day of *March* then instant, for and during the term of three years from thence next ensuing, and fully to be complete and ended; and if the said defendants should give unto the said plaintiff three months' notice in writing for that purpose, previously to the expiration of the said term of three years, then and in that case for and during the further term of four years, making in the whole the term of seven years, from the said 25th day of *March* then instant, at and under the yearly rent or sum of 210*l.*, payable quarterly, &c.; and whereby the said defendants did agree to take and rent the same of the said plaintiff, &c. Averment—that after the making of the said agreement, and more than three months before

the expiration of the said term of three years, the defendants did give notice in writing of their intention to hold and continue tenants of the demised premises for the further term of four years from and after the expiration of the term of three years, making in the whole the term of seven years, according to the provisions in the agreement.—Breach, non-payment of half a year's rent, due on 29th September, 1831. There was a count for use and occupation, and the money counts.—Plea, by *Whichelo*, the general issue. The defendant, *Hull*, pleaded his bankruptcy; upon which the plaintiff entered a *nolle prosequi* as to him.

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At the trial before *Gurney*, B., at the *Middlesex* Sittings in *Trinity* Term last, the following appeared to be the facts of the case:—Some apartments in Regent-street had been let to the defendants by the plaintiff, under the agreement set out in the first count of the declaration.—In *January*, 1829, the defendants gave a written notice to the plaintiff, signed by them, requiring an extension of the term to seven years, according to the clause contained for that purpose in the agreement. On the part of the defendants, *Hull* was called, who was objected to by the plaintiff, as an interested witness. The learned Baron, however, received his evidence, reserving the point as to his competency. By his evidence, it appeared that he and *Whichelo* had occupied the apartments in question, as picture dealers, until *Midsummer*, 1828, at which time they dissolved partnership, and *Whichelo* retired from business. The plaintiff was informed of the dissolution about three months after it took place. In *January*, 1829, *Hull* entered into partnership with a person of the name of *Smart*, and they carried on the business under the firm of *Hull & Co.*, at the premises in question, until their failure in *September*, 1831. After the notice, in *January*, 1829, requiring an extension of the term, which, in conformity with the agreement, and at the plaintiff's desire,

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was made in the names of, and signed by, *Whichelo* and *Hull*, the plaintiff wrote the following letter to his attorney:—

“Dear Sir,—Messrs. *Hull & Co.* have requested me to say, that they wish to have a lease prepared for the residue of the term they hold of part of my house, No. 27; they will apply to you accordingly; the firm is now Messrs. *Hull & Smart*, and I have no objection in granting their request.

John Watson, Esq.
Gerrard Street.

N. Graham.
Feb. 11th, 1829.”

The above letter was written in *Hull's* house, and given to him by the plaintiff, but *Hull* kept it, and never delivered it to Mr. *Watson*. No lease was ever prepared or executed. The defendant proved receipts given by the plaintiff for rent due, until *April*, 1828, as received from *Whichelo & Hull*; and he also proved receipts given by the plaintiff after the dissolution of the partnership between *Whichelo* and *Hull*, for rent, as received from *Hull*, and other receipts given by the plaintiff subsequent to the commencement of the partnership between *Hull* and *Smart*, as for rent received of *Hull & Smart*.

The counsel for the defendant *Whichelo*, contended, that on these facts there was a surrender by operation of law, and an acceptance by the plaintiff of *Smart*, as a new tenant.

The learned Judge thought that the intention to receive *Smart* as a tenant instead of *Whichelo*, was only an inchoate intention, and not binding upon the plaintiff until it was acted upon by *Smart's* becoming a tenant; for, otherwise, the plaintiff might have lost *Whichelo* as a tenant without having got the security of *Smart* as tenant. Under his direction a verdict was found for the plaintiff

for the arrears of rent up to Michaelmas, 1831, and he gave the defendant leave to move to enter a nonsuit.

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Jervis having obtained a rule accordingly, cause was now shewn by—

Hutchinson and Butt.—The defendants remain bound by the original agreement. The notice was given according to the terms agreed upon, and thereby a tenancy for seven years was created. Nothing has been done to determine this tenancy. The letter from *Graham*, which was never shewn to *Whichelo*, could not operate as a surrender. Even if it were a surrender, it could not have been received in evidence, not being stamped—*Williams v. Sawyer* (a). [*Bayley*, B.—If a new lease had been executed to *Hull & Smart*, there might have been a surrender by operation of law, but there being no new lease executed, you contend that *Whichelo* is liable by privity of contract arising from the original agreement.] There cannot be a change of tenancy by surrender by operation of law, without the assent of all the parties. In this case *Whichelo's* assent is not shewn, and the landlord did not obtain any new tenant. In *Matthews v. Sawell* (b) *Gibbs*, C. J., said, that it was “an extremely hard case against the defendant, and the Court has been disposed to struggle to the utmost in his favour;” as, however, there was no new tenant answerable to the plaintiff, they held that the defendant was liable, and that a parol surrender of the lease was void under the statute of frauds. In *Thomas v. Cook* (c), there was the assent of all the parties, and the landlord had a new tenant, upon whom he actually distrained for rent, and the action was for use and occupation, and not upon the privity of contract. In the present case the defence was founded upon the non-occupation of the defendant *Whichelo*, but

(a) 3 B. & B. 70; 6 Moore, 226. (b) 8 Taunt. 270; 2 Moore, 262.

(c) 2 B. & A. 119.

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the action is not brought for use and occupation, but on the privity of contract upon the original agreement. The receipts, at the most only shew that there was an assignment, but the privity of contract remained upon which the lessee was liable. No occupation is necessary, and the lessee is still liable upon the agreement (a). There is the same distinction between *assumpsit* and debt, where the demise is not under seal, as between covenant and debt, where the demise is by deed (b). The mode of declaring adopted in this case, on the special agreement, is the proper way to charge a defendant on the privity of contract where the agreement is not under seal. [They then proceeded to argue against the competency of *Hull*; but, as the Court gave no judgment on that part of the case, the arguments are omitted (c).]

Jervis, contrà.—The interest of *Whichelo* was determined by act and operation of law. In *Thomas v. Cooke* (d), the landlord, with the assent of the tenant, accepted of another person as his tenant, and had distrained upon him; and, although there was no surrender of the original tenant's interest, the circumstances were held to amount to a surrender by act and operation of law within the exception of the statute of frauds. In the present case the circumstances are equally strong. The giving receipts for rent to *Hull* after the dissolution of partnership, and to *Hull & Smart* after the new partnership was established, was a clear relinquishment of *Whichelo* as a tenant; and the letter, as well as the receipts given to *Hull & Smart*, were circumstances from which a jury might well infer an assent to receive *Hull & Smart* as the new tenants. The

(a) 1 Saund. 240.

(b) *Id.* 140, note (p), last edition.

(c) See *Aftalo v. Fourdrinier*,

6 Bing. 306; *Worrall v. Jones*,

5 M. & . 241; *Bate v. Russel*,
1 M. & M. 332.

(d) 2 B. & A. 119.

case falls, therefore, within the decision of *Thomas v. Cooke*, and the circumstances which took place amount to a valid surrender of *Whichelo's* interest by act and operation of law.

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BAYLEY, B.—It seems to me that this case is distinguishable from *Thomas v. Cooke*. In that case the lessee underlet, and the lessor accepted the underlessee as his tenant, and the original lessee assented; so that all the three parties assented to the arrangement by which the underlessee became the immediate tenant to the original landlord. Now, if it could have been made out in the present case that the plaintiff agreed to give up *Whichelo*, that *Whichelo* assented, and that *Smart* agreed to become tenant, the principle of *Thomas v. Cooke* would apply,—but I am of opinion that this case is very different, because there was no agreement on the part of *Graham* to give up *Whichelo*, or on the part of *Smart* to be bound as tenant. There was, originally, an agreement for three years, and, if the tenants chose, they were at liberty to extend the term to seven years by giving a notice to that effect to the plaintiff. Before the period when the notice was given, *Whichelo* retired from the business and went into the country. This was as early as *July*, 1828, and at that time the rent was received as from *Hull* alone. Now, in *January*, 1829, *Whichelo*, who had retired from the business and ceased to be a member of the firm, concurs and joins in the giving a notice to the plaintiff, requiring a further extension of the term. That appears to me to be a distinct acknowledgment by *Whichelo*, that he considered himself as continuing at that time in the relation of tenant to the plaintiff. What is there, subsequent to that period, to shew that this relation was put an end to? Some circumstances have been pressed upon us, to shew that the tenancy was determined by act and operation of law. One is the receipts

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given by the plaintiff for rent, as from *Hull & Smart*; but I cannot consider that circumstance as an undertaking by the landlord to give up the former tenant, and there is no evidence that *Smart* ever agreed to become liable as tenant. The letter from the plaintiff has also been relied upon; by that letter the plaintiff shewed a readiness to accept *Smart* as the new tenant, and to agree that a new lease should be made to *Hull & Smart* as tenants; but, can a readiness to accept a new tenant by an instrument, which, if executed, would have made both *Hull* and *Smart* liable as tenants, have the effect of discharging the old tenant, when such instrument is never executed, and no person is substituted in the place of the original tenant? *Graham* was ready to accept *Smart & Hull* as tenants, if they would come under a personal engagement to him; but there was no agreement on his part to discharge *Whichelo*, or to accept a surrender unless he got a new tenant. To make out the defence, it should have been shewn that the plaintiff gave up *Whichelo* and accepted *Smart* as tenant; but, on the evidence, there never was any substitution of any new person who was liable to the plaintiff as tenant, nor was there, from first to last, any thing which could discharge the defendant *Whichelo* from his liability. I am, therefore, of opinion that this rule should be discharged.

BOLLAND, B.—I have looked in vain for any thing which could have had the effect of preventing the defendant *Whichelo* from insisting that his interest remained, if this lease had turned out beneficial. The only circumstance which pressed upon my mind was, the letter of the plaintiff, and if that letter had been acted upon, the case would have assumed a different aspect, but, to make the defence available on this ground, the defendant ought to have gone much further, and shewn that *Smart* was substituted as tenant according to the terms of that letter.

GURNEY, B.—One of the parties, who ought to have concurred, has done nothing at all, and another has only evinced his readiness. The intention was merely inchoate, and never was carried into execution. The true test is, whether *Whicelo* could not have insisted upon any benefit to accrue from this lease.

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Rule discharged.

THE KING (at the suit of NIGHTINGALE) v. BUCHANAN.

SPECIAL writs of *capias utlagatum*, returnable in *July*, 1831, and *March*, 1832, had been issued in this matter, and inquisitions taken, upon which the jury had found certain debts due from the *East India Company* to the defendant. The plaintiff petitioned that the money raised by the sheriff might be paid to him in satisfaction of his debt and costs; and on the 19th of *June*, 1832, the usual warrant and consent of the Attorney-General, to an order in compliance with such petition, was obtained. On the 4th of *July*, the personal representatives of the defendant, on an affidavit stating that the defendant had died at *Paris*, on the 30th of *May* preceding, and that the deponent had seen him in his coffin, obtained a Baron's order to stay the money in the hands of the sheriff until the 10th of *November*, that in the mean time he might have an opportunity of pleading that the defendant had died. That plea having been entered on the roll—

Wray now moved, on behalf of the personal representatives, that the order by the Court, on the Attorney-General's consent for the payment of the money,

The King's warrant and the Attorney-General's consent, for the payment of money in the hands of the sheriff under a *capias utlagatum*, do not amount to an appropriation of that money, where they are granted in ignorance of the death of the defendant; and the Court, on a plea by his representatives, suggesting the death, will stay the making of an order for the payment, until the fact of the death is determined on an issue taken on the plea.

An affidavit, stating that the defendant died on such a day, and that the deponent had seen him in his

coffin, is sufficient for the purpose of reversing an outlawry, where the defendant dies abroad; and the ordinary rule that there must be a certificate from the minister of the parish where the party died or was buried, does not apply.

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might be further stayed. He contended, that, until such order, the plaintiff was not entitled to the money; and therefore, if the plaintiff had died as suggested, the defendant's representatives were entitled to judgment of *amoveas manus*. That, as the Attorney-General had two months either to confess or deny the death, it was essential that no order should be made until the fact of the death, and the time at which it happened, were ascertained.

Jervis, contra, insisted that this application was too late, inasmuch as the warrant from the Treasury and the Attorney-General's consent were an appropriation of the money to the plaintiff. He further objected, that the affidavit of the death was insufficient, and that, in order to reverse an outlawry on death, there must be a certificate from a minister of the parish where the party died or was buried, as well as an affidavit of his death by some person acquainted with him, who was present at his burial; and cited *Tidd's Practice*, 144, 9th edition.

LORD LYNTHURST, C. B.—If the fact of the previous death of the party outlawed had been known, the warrant and the Attorney-General's consent would not have been granted. They do not amount to an appropriation; because, that which is done by the Crown under a mistake, is to be considered as though it had not been done at all. The circumstances here account for this mistake, and they dispense with the necessity of such proofs of the death as in ordinary cases the Court requires. How can a certificate of the death be obtained from the minister of the parish, when a party dies in France? If the plaintiff disputes the fact of the death, he may traverse the plea.

The other Barons concurred.

Rule granted.

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PIGGOTT v. KEMP and Others.

ASSAULT and battery.

The fifth plea stated, that one *John Easto* and one *Samuel Bullen*, before and at the said several times when, &c. were possessed of a certain dwelling-house and close, with the appurtenances, situate and being at *Mulbarton*, in the county of *Norfolk*; and being so possessed thereof, the said plaintiff just before and at the several times when, &c. (to wit), on &c., was unlawfully in possession of the said dwelling-house, and with force and arms making a great noise and disturbance therein, and at the said times when, &c. was therein making such noise and disturbance without the leave or licence, and against the will of the said *John Easto* and *Samuel Bullen*; and, thereupon, the said defendants, as the servants of the said *John Easto* and *Samuel Bullen*, and by their command, then and there requested the said plaintiff to cease making his said noise and disturbance, and to go and depart from and out of the said dwelling-house and close, which the said plaintiff then and there wholly refused to do, whereupon the said defendants, as the servants of the said *John Easto* and *Samuel Bullen*, and by their command, in the defence of the possession of the said last-mentioned dwelling-house, gently laid their hands on the said plaintiff in order to remove him from the said dwelling-house; and because he the said plaintiff was then and there armed with divers, (to wit), two loaded pistols, and then and there assaulted the said defendants with the said pistols, and used violent and menacing language and gesture, and put them, the said defendants, in alarm and peril of their lives, they, the said defendants, in order to protect and defend themselves, and because they could not otherwise protect themselves, wrested and took the said pistols from the said plaintiff, and, in so doing, necessarily and unavoidably seized and laid hold of the said plaintiff by his arms, and

In an action of assault and battery, *de injuria* is a good replication to a plea, stating that *J. E.* and *S. B.* were possessed of a close, and that the plaintiff was making noise, &c., and the defendants, as servants of *J. E.* and *S. B.*, and by their command, requested him to depart, and he refused, whereupon defendants, as the servants of *J. E.* and *S. B.*, gently laid hands, &c., and because plaintiff resisted, defendants, as servants, &c., and by command, &c., a little hurt, &c.

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wrong." By giving this general replication to a plea of authority from a stranger, the legislature seems to have taken it for granted that such a replication would not have been good at common law. [Lord *Lyndhurst*, C.B.—That might be to remove a doubt.] There are authorities to the same effect since *Crogate's* case. In *Finch*, p. 395, it is laid down, that a warrant from a justice of the peace cannot be so traversed, and it is put on the same ground as a title or licence from the plaintiff. If such warrant be matter of record, *Selby v. Bardons* is wrongly decided; if it be not matter of record, this is a distinct authority that command from a stranger is not traversable by the common replication. In *Chancey v. Win* (a), Lord *Holt* says, that when one justifies by virtue of a warrant of a justice of the peace, it may not be proper to involve the warrant in the issue. In *Jones v. Kitchen* (b), *Eyre*, C. J., says, this replication is not allowed if the plea relate to *any commandment*. This *dictum* is cited as law by Mr. Serjeant *Williams* in 2 *Wms. Saund.* (c). And all the text books lay it down that commandment generally cannot be involved in the issue. *Doctrina Placitandi* (d). "If a man justify by warrant of another, *de injuria* is no plea (e)." The precedents, too, are the same way, for where one justifies in his own right, and another as his servant, it is usual to protest the command.

Besides, it is difficult to perceive any reason why authority from a stranger should be put on a different footing from authority derived from the plaintiff. In both cases two distinct matters, the fact of the authority and the pursuance of it, are necessarily involved in the issue.

Secondly, this traverse involves title to land. It involves first the title of *Easto* and *Bullen*. It may be conceded that the fact of actual possession is traversable by the ge-

(a) 12 Mod. 580.

(b) 1 B. & P. 80.

(c) 295 b.

(d) Page 113.

(e) 1 Chitty on Pl. 514; Stephen on Pl. 204.

neral replication; but the right of possession, or, in other words, a possessory title, is not so, nor any interest in land, however inconsiderable. *Crogate's* case, 2nd Resolution. Now it does not appear from the plea that *Easto* and *Bullen* were actually on the land, but rather the contrary, for it is stated that the plaintiff was in possession (a). Besides, unless *Easto* and *Bullen* were rightfully in possession, the command is no defence. The possession alleged by them is therefore merely a right of possession, i. e. a possessory title, and, therefore, not thus traversable. This is the distinction between this case and the case of *Hall v. Gerrard* (b), where it was held, that the fact of possession was traversable; for there it appeared on the plea that the person, in whom possession was alleged to be, was actually on the land.

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The issue involves, secondly, the title of the plaintiff, for it is alleged that he was unlawfully in possession. This allegation he denies, putting thus in issue both the fact and the legality of his possession, in other words his possessory title to the land. In neither of these cases is the title mere inducement, as in *Taylor v. Markham* (c), but of the substance of the plea, and necessary to be proved. [Lord *Lyndhurst*, C. B.—The only doubt is on the point as to the command.]

B. Andrews, contra.—The command was involved in the issue in *Selby v. Bardons*. That case, therefore, is an authority on the question of the command as well as on that of the multiplicity of the facts in issue. *Chancey v. Win* is a direct authority. [Bayley, B.—In that case some of the defendants justified as servants.] In the Archbishop of *Canterbury v. Kemp* (d), *Coke* said, that *de injuriâ* is

(a) It was subsequently agreed noise, &c. &c.

that the argument should proceed as if the plea had been in the (b) *Latch*, 221.

common form, that the plaintiff (c) *Yelv.* 157.

was wrongfully there making great (d) 1 *Cro. Eliz.* 539.

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not any plea where the defendant makes justification by claiming an interest in the freehold to himself; but where one claims not any interest, *but justifies by command or authority derived from another*, it is otherwise. In *Doctrina Placitandi* (a) the distinction is taken between an authority derived mediately or immediately from the plaintiff himself, and one derived from another. The command of the plaintiff is in itself a defence, whilst the command of another person is only one of a whole series of facts which constitute one defence.

The authorities cited on the other side shew that the command could not be traversed at all, which had been held as the law in actions of trespass *quare clausum fregit*, until the contrary was decided in *Chambers v. Donaldson* (b).

In the present case, the plea consists of mere matter of excuse. [*Bayley, B.*—It would come to this, that, in an action against master and servant, there might be a general traverse of the plea against the one and not against the other.]

The Court expressed a very strong opinion that the replication was good, whereupon—

Byles obtained leave to withdraw the demurrer and—

Amend, upon payment of costs.

(a) Page 115.

(b) 11 East, 65.

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HARRISON v. BENNETT.

THIS cause was tried before BOLLAND, B., at the Summer Assizes, at *Chester*, 1831. The jury, having retired to consider their verdict, returned and found a verdict for the plaintiff, with no damages. The learned Judge directed the jury to reconsider their verdict; and as they were again retiring, one of the jury absconded. After diligent inquiry he could not be found, and the defendant proposed to take the verdict of the eleven jurors. The plaintiff would not consent, and the other jurors were accordingly discharged.

Where, during the trial of a cause, one of the jury absconded, and the other jurors were accordingly discharged; and a second trial was afterwards had, when a verdict was found for the plaintiff:—*Held*, that the plaintiff was entitled to the costs of the first trial.

The cause was again tried at the following Spring Assizes, before *Bosanquet*, J., and the jury found a verdict for the plaintiff. The Master doubted whether he could allow the costs of the first trial, on which—

Lloyd moved for a rule to review the taxation. Against which—

J. Jervis shewed cause, and contended, that, as neither party was in fault, the costs should be borne equally between them, more particularly as the defendant had offered to take the verdict with the eleven jurors. He referred to the case of *Rowe v. Brenton*, MSS., in which the trial had miscarried in consequence of the illness of a juror, and each party had borne his own costs.

Lloyd, *contra*, submitted, that the finding of the jury on the second trial shewed that the plaintiff had a just demand; and, as by resisting that demand the defendant had driven the plaintiff to trial, he was in fault, and was answerable for the consequences. He assimilated this to the case where the cause is made a *remaret*, without the fault of either party, *Tidd's Practice*, 758, 9th edition; and

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observed, that the decision of the Master in the case of *Rowe v. Brenton* had been acquiesced in, without an application to the Court.

Cur. adv. vult.

LORD LYNTHURST, C. B.—The plaintiff was not bound to take the verdict of eleven jurors; and as the finding of the second jury shews that the defendant, by resisting the demand of the plaintiff, was the cause of the litigation, he must be answerable for the consequences, and pay the costs of the first trial.

Rule absolute.

HEMBRO v. BAILEY and Others.

In a count for trespass and assault, the defendant pleaded a justification in defence of a dwelling-house, with an averment "which is the same trespass &c." and concluded with a traverse, *adque hoc* that he was guilty elsewhere than in the dwelling-house:—*Held*, that the *quæ est eadem* was sufficient, and that the traverse was surplusage, and bad on special demurrer.

THIS was an action of trespass for an assault, and the venue was laid in the county of *Somerset*, without specifying any parish or place.

Amongst other pleas, there was one justifying the assault in defence of the possession of a house of the defendant *Bailey*, "situate in the county aforesaid," and the plea concluded with an averment as follows "which are the said supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath complained against the said defendants; without this, that the said defendants were guilty of the said supposed trespasses, or any or either of them, elsewhere than in the said dwelling-house situate as aforesaid," and this they are ready to verify, &c. To this plea there was a special demurrer, assigning for cause, amongst other things, that it traversed what was not alleged in the declaration, and that it contained an immaterial traverse, and that it traversed what was not properly traversable.

Follett, in support of the demurrer, contended that the averment of the trespasses justified being the same as were complained of, was an averment that they took place in the dwelling-house and not elsewhere, and that the addition of a traverse of the defendants being guilty elsewhere was at least surplusage, and therefore bad on special demurrer; and referred to *Hargrave v. Ward* (a), and *Courtney v. Satchwell* (b), and particularly to *Mellor v. Walker* (c), and the authorities there collected by Serjeant *Williams*, and the note of the editors in the edition by *Patteson and Williams*, as shewing that the averment of the *quæ est eadem* would be now held sufficient without the addition of the *absque hoc*.

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Erle, *contrà*, contended that this was a local justification to a transitory trespass; and that to such a justification, a traverse of the alleged trespasses having been committed elsewhere than within the limits to which the local justification extended was necessary; and that in the same note of Serjeant *Williams*, two reasons were assigned for this strictness in the plea, one that it might appear to the Court that the defendant acted under the authority of the law, and the other to ascertain with correctness the place of the justification to which the *venire facias* is to be awarded; that the precedents from the time of *Elizabeth* were uniform in requiring the traverse, which precedents were referred to in the same note (d); and he relied particularly on *Co. Litt.* 282. b., *Peacock v. Peacock* (e), and *Dame Madicin's case* (f); that, although the reason relating to the awarding of the *venire facias* no longer existed, since the 4 *Ann.* c. 16, directing the *venire facias* to be awarded out of the body of the county, still it had been decided that

(a) *Lut.* 1457.

(b) 1 *Str.* 694.

(c) 2 *Saund.* 5, n. 3.

(d) In 2 *Saund.* 5.

(e) *Cro. Eliz.* 706.

(f) 1 *Sid.* 293.

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the precedents must govern; and that, where to a trespass for taking cattle at *Hereford*, the defendant justified the taking, as bailiff of the manor of *A.*, under a *distringas* from the Court of that manor, and concluded with a *quæ est eadem*, but without the *absque hoc* that he was guilty elsewhere out of the manor of *A.*, and there was a special demurrer for the omission of the *absque hoc* the Court, after two arguments, held the plea bad for the omission of the *absque hoc*. *Benjamin v. Howell* (a).

LORD LYNTHURST, C. B.—Mr. Serjeant *Williams* says, that the reason being put an end to, it is reduced to a matter of mere form; and he gives a very sound reason for the *quæ est eadem* being sufficient. There can be no necessity for adding a traverse; the reason of the form used in the ancient precedents no longer exists.

BAYLEY, B.—Try it on principle: the allegation in the declaration is transitory as to time and place; the plaintiff might give in evidence an assault at any time and place. Then the defendant justifies an assault in a particular place, and adds, that it is the same assault complained of in the declaration. Does he not thereby virtually exclude any other place, and then is not the traverse superfluous, and consequently bad on special demurrer?

Leave to amend, by striking out the traverse without costs.

(a) 1 Wils. 81; 2 Str. 5 c, note (p), last edition.

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GOMPERTZ v. DENTON.

ASSUMPSIT on the warranty of a horse exchanged for another horse with 30*l.* paid as the difference of value, with counts for goods sold and delivered, and money had and received. At the trial, the plaintiff recovered 48*l.* 8*s.* 6*d.* The plaintiff had held the defendant to bail for 90*l.* A rule had been obtained by *Holt*, calling on the plaintiff to shew cause why the defendant should not be allowed his costs pursuant to the statute 43 *Geo.* 3, c. 46, s. 3. It appeared from the plaintiff's affidavits in opposition to the rule, that the arrest was made for 60*l.*, the price and value of a horse, and 30*l.* money paid, being the difference in exchange for another horse of the defendant's, valued at 90*l.*, warranted sound; that the defendant's horse proved to be unsound, and the plaintiff took him back to the defendant, offering to rescind the contract; that the defendant at first was willing to do so; but they subsequently quarrelled, and no final agreement was come to between the parties.

The purchaser of a horse can recover for breach of a warranty, in an action for damages only, and cannot sue on the *indebitatus* counts, as on a failure of the original consideration, unless there was a stipulation in the original agreement for rescinding the contract in such event, or unless both parties subsequently agree to rescind, or unless the case be one of fraud; and, therefore, there is no reasonable or probable cause within 43 *Geo.* 3, c. 46, for holding to bail in a case not within those exceptions.

R. V. Richards now shewed cause.—The question here is, whether the plaintiff had reasonable and probable cause for making this arrest. The plaintiff rescinded the contract, and, therefore, he was entitled to recover from the defendant the amount which he had given him for the horse in question. [*Bayley*, B.—One party cannot rescind the contract unless the other party agrees to it.] But suppose he was not strictly entitled to do so, the plaintiff might still have a reasonable and probable cause for making the arrest. In *Turner v. Prince* (a), *Best*, C. J., says —“ I do not say that the Court will in no case grant a rule to give the defendant his costs, where the arrest is for

(a) 5 Bing. 191; S. C. 2 M. & P. 305.

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100*l.*, and the plaintiff recovers only 39*l.* But it must be a very strong case. This is too complicated a transaction for us to say that the defendant could successfully sue the plaintiff for maliciously holding him to bail; and, unless he could do so, there is no ground for making this rule absolute." [*Bayley, B.*—To entitle a defendant to recover his costs under this statute, it is not necessary to shew malice. *Donlan v. Brett (a).*] In *Sherwood v. Taylor (b)* it is said "The object of the statute was to save the defendant the expense and inconvenience of an action for a malicious arrest; and the proof offered, on applications such as the present, must go to the same extent as the proof in such an action;" and, "it lies on the defendant to shew that there was no probable cause for the arrest." Here the jury found a verdict for 48*l.* 8*s.* 6*d.*, and allowed 30*l.* for the horse given in exchange, the other horse being proved to be unsound. [*Bayley, B.*—The contract of warranty was open, and entitled the plaintiff to recover damages for the breach of it, but did not entitle him to return the horse, and rescind the contract. In *Street v. Blay (c)*, the law on this subject was fully considered by the Court of *King's Bench*, and it was there laid down, that a purchaser has no right to return the article, unless there has been a condition in the original contract authorizing the return, or the vendor has subsequently consented to rescind the contract, or unless the case turn out to be one of fraud. Lord *Lyndhurst*.—If we are of opinion, that, unless the other party agreed to rescind the contract, the plaintiff has no power to do so, how can you contend that you had a right to hold the defendant to bail? *Bayley, B.*—According to *Power v. Welles (d)*, if the contract is still open, you cannot maintain an action for money had and received.] It is submitted,

(a) 10 B. & C. 117.

(c) 2 B. & Ad. 456.

(b) 6 Bing. 280; S. C. 3 M. &

(d) Cowper, 818.

P. 641.

that it is not necessary to shew an absolute formal rescinding of the contract. It is sufficient if there was enough for the jury to conclude that the contract was once agreed to be rescinded.

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LORD LYNTHURST, C. B.—There was a proposition to rescind the contract, which the defendant was at first willing to accede to, but the agreement to rescind was never completed; therefore, the contract remained open. One party alone could not, by his own act, rescind the contract. The plaintiff had no right, therefore, to hold the defendant to bail at all. The case of *Street v. Blay* seems to have been very much considered. That case shews that you cannot treat a contract as rescinded on the ground of the breach of warranty, except there was an original agreement that the party should be at liberty to rescind in such case, or unless both parties have consented to rescind it. According to that decision, which is the most recent, your remedy was an action for damages; and it follows that you could have no reasonable or probable cause for holding to bail.

BAYLEY, B.—I take the rule to be, that, if the contract remains open so as to give the party a right to recover damages for a breach of warranty, he cannot maintain an action of *indebitatus assumpsit* on the ground of the failure of the consideration.

Rule absolute.

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JOHN WHEELER,

Plaintiff.

WILLIAM DUKE, GEORGE DUKE, JOHN LIGHTWOOD and SARAH his Wife, JOHN DUKE and ELIZABETH DUKE, WILLIAM DUKE the younger, ELIZABETH LIGHTWOOD, THOMAS LIGHTWOOD, WILLIAM DUKE, son of GEORGE DUKE, GEORGE DUKE the younger, SARAH DUKE, JOHN DUKE the younger, MARY ANN DUKE, MARIA DUKE, ANN CLEMENTS, and ANN DUKE, widow,

Defendants.

By marriage settlement, land was conveyed to trustees to the use of the husband for life, and from and after his decease, in case the wife survived him, To the use and intent that the wife should receive 14s. per week; and subject thereto that the trustees should, from time to time, and at all times thereafter, stand possessed of the residue to the use of all and every the child and children of his former wife, namely, *A. B., C. D., E. F., G. H., and I. K.,* and their issue lawfully begotten and to be begotten, equally to be divided between and amongst them in equal shares and proportions, as tenants in common, and not as joint tenants, and his, her, or their respective issues:—*Held*, that the five children took estates for life, and that no estate was taken by grandchildren born after the settlement and before the death of the settlor, the husband, or by grandchildren born after his death.

THE Master of the Rolls sent the following case for the opinion of this Court:—

George Duke (since deceased) being seised in fee previous to, and in contemplation of, his marriage with *Ann Grove*, now the defendant *Ann Duke*, by indentures of lease and release, bearing date respectively the 2nd and 3rd days of *April*, 1828, between the said *George Duke* of the first part, the said *Ann Grove* of the second part, and the said *Ann Clements*, the plaintiff *John Wheeler*, *Thomas Harrison* (since deceased), and the defendant *William Duke*, the son of the said *George Duke*, of the third part, reciting that the said *George Duke* was seised in fee of a piece of land and sixteen messuages or dwelling-houses which he had erected thereon, and premises in *Walmer Lane*, in *Birmingham*, being the premises thereby released; and that a marriage was intended to be had and solemnized by and between the said *George Duke* and *Ann Grove*; and that it was agreed by and between the said *George Duke* and *Ann Grove*, upon the treaty of the said marriage, that, in case the said *Ann Grove*, the

said intended wife of the said *George Duke*, should survive him the said *George Duke*, she should receive, out of the rents and profits of the said sixteen messuages or dwelling-houses erected upon the said piece of land, for and during the term of her natural life, the sum of 14*l.* per week; and that the residue of the rents, issues, and profits of the said sixteen messuages or dwelling-houses from and after the decease of the said *George Duke*, should be equally divided between and amongst the then children of the said *George Duke* by his former wife, namely, *William, George, Sarah, John, and Elinabeth*, and their issue; and for which purpose the said *George Duke* had agreed to grant and convey the said piece of land, sixteen messuages or dwelling-houses and premises, upon the trusts, and for the several ends, intents, and purposes hereinafter mentioned, expressed, and declared of and concerning the same: He, the said *George Duke*, in pursuance of the said agreement, and in contemplation and prospect of the said marriage, and for the purposes of making a provision for the said *Ann Grove*, in case the said marriage should take effect, and she should survive him; and also in consideration of 10*l.* to be paid to the said *George Duke* by the said *Ann Clements, John Wheeler, Thomas Harrison, and William Duke*; granted, bargained, sold, released, and confirmed unto the said *Ann Clements, John Wheeler, Thomas Harrison, and William Duke*, their heirs and assigns, all the said premises in *Walmer Lane* hereby released, to hold the same with their appurtenants unto the said *Ann Clements, John Wheeler, Thomas Harrison, and William Duke*, their heirs and assigns, for ever, To the use of the said *George Duke*, during his life; and from and after the decease of the said *George Duke*, in case the said *Ann Grove*, his said then intended wife, should survive him and be then living, To the use, intent, and purpose that the said *Ann Grove*, the then intended wife of the said *George*

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Ann Duke or her assigns, should, from time to time, and at all times during her life, from and out of the said yearly rents, issues, and profits of the said premises, receive the sum of 14s. weekly and every week, to and for her and their own use and benefit: and subject thereto, that the said *Ann Clements, John Wheeler, Thomas Harrison, and William Duke*, and the survivors and survivor of them, and the heirs and assigns of such survivor, should, from time to time, and at all times thereafter, stand possessed of the residue of the said clear yearly rents, issues, and profits of the said piece of land, and sixteen messuages, dwelling-houses, and premises, to the use of all and every the child or children of the said *George Duke* by his former wife, namely, *William Duke, George Duke, Sarah Duke, John Duke, and Elizabeth Duke*, and their issue lawfully begotten and to be begotten, equally to be divided between or amongst them in equal shares and proportions, as tenants in common, and not as joint tenants, and his, her, or their respective issue; and from and after the death of the said *Ann Grove*, the intended wife of the said *George Duke*, upon further trust that they, the said *Ann Clements, John Wheeler, Thomas Harrison, and William Duke*, and the survivors and survivor of them, and the heirs and assigns of such survivor, do and shall, from time to time, and at all times hereafter, stand possessed of the said weekly sum of 14s.; In trust for all and every the child and children of the said *George Duke* by the said *Ann Grove*, his intended wife, which shall be living at the time of the death of the said *Ann Grove*, and the said *William Duke, George Duke* the son, *Sarah Duke, John Duke, and Elizabeth Duke*, or their issue lawfully begotten and to be begotten, share and share alike. And in case there shall be no child or children of the marriage of the said *George Duke* the father and the said *Ann Grove*, or in case of there being such, and all of them shall die without leaving lawful issue living at the decease of the said *Ann*

Grove, then upon trust that they, the said *Ann Clements*, *John Wheeler*, *Thomas Harrison*, and *William Duke*, and the survivors and survivor of them, and the heirs and assigns of such survivor, do and shall, from time to time, and at all times hereafter, stand possessed of the whole of the said clear yearly rents, issues, and profits of the said piece or parcel of land, messuages, tenements, or dwelling-houses, buildings, hereditaments, and premises lastly hereby released and conveyed, or mentioned or intended so to be, Upon trust for all and every the said *William Duke*, *George Duke*, *Sarah Duke*, *John Duke*, and *Elizabeth Duke*, and their issue, or the survivors or survivor of them, who shall be then living, and their issue, in equal shares and proportions as tenants in common, and not as joint tenants, and his, her, and their respective issues; And upon further trust, that, in case any one or more of the said *William Duke*, *George Duke*, *Sarah Duke*, *John Duke*, and *Elizabeth Duke* shall die without leaving lawful issue of his, her, or their body or respective bodies living at his, her, or their deaths or respective deaths, then that they, the said *Ann Clements*, *John Wheeler*, *Thomas Harrison*, and *William Duke*, and the survivors and survivor of them, and the heirs and assigns of such survivor, do and shall, from time to time, and at all times hereafter, stand possessed of the said yearly rents, issues, and profits of the said piece or parcel of land or ground, messuages, tenements, or dwelling-houses, buildings, hereditaments, and premises lastly hereby released and conveyed, or mentioned or intended so to be; Upon trust for the survivors or survivor of them the said *William Duke*, *George Duke*, *Sarah Duke*, *John Duke*, and *Elizabeth Duke*, and their issue; and in case all of them, the said *William Duke*, *George Duke*, *Sarah Duke*, *John Duke*, and *Elizabeth Duke* shall die without leaving lawful issue of his, her, or their body or bodies, then that they, the said *Ann Clements*, *John Wheeler*, *Thomas Harrison*, and *William*

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Duke, and the survivors and survivor of them, and the heirs and assigns of such survivor, do and shall stand possessed of the said rents, issues, and profits of the said last-mentioned piece or parcel of land, messuages, tenements, or dwelling-houses, buildings, hereditaments, and premises, and the same piece or parcel of land, messuages, tenements, or dwelling-houses, buildings, hereditaments, and premises, Upon trust for the right heirs of the said *George Duke* the elder for ever, and to and for no other trust, and intent, or purpose whatsoever.

The said *George Duke*, the settlor, died on or about the 21st November, 1827. The said *William Duke*, *George Duke*, *Sarah*, now the wife of *John Lightwood*, *John Duke* and *Elizabeth Duke*, who were the children of the said *George Duke* by his former marriage, are still living. None of them had any issue born at the date of the said indenture of settlement; but, between that time and the death of the settlor, the following issue of the children of the said *George*, by his former marriage, were born, that is to say, *William Duke*, the younger son of *William Duke*, *Elizabeth*, daughter of *Sarah Lightwood*, *William Duke*, *George Duke*, *Sarah Duke*, and *John Duke*, children of *George Duke*, making six grandchildren of the settlor, born between the date of the said indenture of settlement and his death. Since the death of *George Duke*, the settlor, the said *Sarah Lightwood* has had another child, namely, *Thomas Lightwood*; and the said *John Duke*, the son of the settlor, has had issue two children, namely, *Mary Duke* and *Maria Duke*; and the said *George Duke* has had issue one child, not yet christened, making four grandchildren born after his death.

The questions for the opinion of the Court were, whether any and what estate and interest in the said piece of land and sixteen houses and premises, erected by the said *George Duke* thereon, passed by the said indenture of settlement, bearing date the 2nd and 3rd April, 1818, to the

said *William Duke, George Duke, Sarah Lightwood, John Duke, and Elizabeth Duke*—whether any and what estate and interest in the said piece of land and sixteen houses and premises, passed by the said indenture of settlement to *William Duke*, son of *William Duke, Elizabeth Lightwood, William Duke, George Duke, Sarah Duke, and John Duke*, children of *George Duke*, being the six grandchildren of the said *George Duke*, the settlor, who were born between the date of the said indentures of settlement and his death—Whether any and what estate and interest in the said piece of land and sixteen houses and premises passed by the said indenture of settlement to *Thomas Lightwood, Mary Duke, and Maria Duke*, the grandchildren of the settlor, who were born after his death.

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Barber, for the defendants *George Duke, Sarah Lightwood, John Duke, and Elizabeth Duke*.—The children may be argued to have taken an estate tail. [*Bayley, B.*—Without the word *heirs*?] There is one case, *Galley v. Barrington* (a), in which an estate of inheritance was held to pass without the use of the word *heir*. [*Bayley, B.*—The Court of *Common Pleas* thought, in that case, they could supply the word *heirs* from the other parts of the settlement.] Conceding then that the children do not take an estate tail, they all five clearly take estates for life. The words are “to the use of all and every the child or children of *G. D.* by his former wife (naming them) and their issue.” This clearly gives them estates for life. In *Co. Litt.* 20. b. it is said—“If a man give lands or tenements to a man *et semini suo* or *exitibus vel prolibus de corpore suo*, to a man and his seed, or to the issues or children of his body, he hath but an estate for life.”

(a) 10 B. Moore, 21; 8 C. 2 Bing. 387.

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It is impossible to distinguish the present case from this authority. The remainder here is given *nominatim* to the issue. [*Bayley, B.*—Can it be put that it would open to let in the issue as they arise?] The authorities do not support that view of the case. The settlor has failed as to the issue, but he has given the life estate to persons *in esse* at the time of the settlement, and capable of taking.

Torriano appeared for the three grandchildren born after the death of the settlor.

Koe appeared for the trustees.

Piggott for the heir-at-law.—The heir-at-law takes the whole. The deed recites that the settlor was seised in fee; and, by the settlement in question, the estate is given to the children of the settlor by his former wife, and their issue lawfully begotten and to be begotten, equally to be divided between or amongst them, as tenants in common, and not as joint tenants, and his, her, or their respective issue. This, coupled with the preceding words, “at all times hereafter,” as to the seisin of the trustees, clearly shews the intention that the issue to the most remote generation should take as purchasers. The word issue, in the deed, is a word of purchase—*Fitzherbert v. Heathcote*, cited in *Bayley v. Morris* (a). This intention cannot be effectuated. It is quite contrary to law, that a remainder, when it has once vested in possession, should open so as to let in after-born children or issue. If it were to be held that the children or issue born at the time of the death of the settlor should take, they would take quite differently from what the settlor intended they should. The present case is widely

(a) 4 Vez. jun. 794.

different from the class of cases where it has been held that the limitation could be confined to children or issue born at the time of the death of the settlor or devisor. To adopt that construction, it would be necessary to reject altogether the words "at all times hereafter." If these words had not occurred in the settlement, it might have been held that the limitation was confined to children and issue born at the death of the settlor. *Mogg v. Mogg* (a). By those words, however, it clearly appears that the settlor intended that all his children, grandchildren, and issue should take. That intention cannot be effectuated according to the rules of law, and, therefore, the heir-at-law is entitled to the whole.

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Cooper, for the six grandchildren born in the life-time of the settlor. The children take estates for life, and the grandchildren born in the life-time of the settlor take precisely the same estate. No issue was born at the time of the settlement; but, under the description of issue, the grandchildren born at the death of the settlor take an equal share with the children named in the settlement. The clause has provided for an event which has happened, namely, the birth of grandchildren in the life-time of the settlor, during the pendency of the life-estate. In the case of a will, it would be different; for in a will the word "issue" will create an estate tail, the word "issue" in a will being a word of limitation, and not of purchase; though, even in a will, it may be a word of purchase where words occur inconsistent with the intention of giving an estate tail. *Doe v. Elvey* (b). The passage in *Co. Litt.* which has been cited, shews that, in general, the word "issue" has a different construction in a deed from what it would have in a will; but, in the present case, the word occurs

(a) 1 Merivale, 664.

(b) 4 East, 313.

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not in a limitation of an estate *in præsentia*, but by way of remainder, and the remainder will open to let in all the issue who may come into existence pending the duration of the particular estate. In *2 Preston on Abstracts (a)*, it is said—"Though at common law joint tenants must be capable of taking at one and the same time, yet, under the learning of uses and executory devises, persons may be joint tenants who take at different times; thus, under a devise or limitation to the use of the children of A., the estate may vest altogether in one; afterwards, when a second child is born, in two; and afterwards, on the birth of a third child, in the three; and so on progressively as the children are born." In the case of *Mogg v. Mogg (b)*, Lord Eldon acted upon this doctrine. The word "issue," then, in the present case, is *designatio personæ*, and the effect is the same as if the children and grandchildren had been specially named—*Id certum est quod certum reddi potest*; and the Court can easily ascertain who are the persons in existence when the estate vests in possession.

Barber, in reply.—The only question is, whether the issue can take. It is clear, that by the deed they are intended to derive the estate through the first takers, and not to participate with them in it. There is no case where, either in a will or a deed, the issue under such a limitation have been held to take *jointly* with the first taker. [Lord Lyndhurst, C. B.—According to my present impression, the five children take an estate for life. We will consider the case, and certify our opinion.]

The following certificate was afterwards sent:—

Taking it for granted that the indenture of settlement of 2nd and 3rd April, 1818, vests the legal estate in the

(a) Pages 67, 68.

(b) 1 Merivale, 664.

persons beneficially entitled under it, (which has not been argued before us, and upon which we express no opinion), we are of opinion that an estate for life, subject to the widow's 14s. a week in the said piece of land and houses, passed by the said indenture of settlement to the said *William Duke, George Duke, Sarah Lightwood, John Duke, and Elinabeth Duke.*

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2nd. We are of opinion, that no estate or interest passed to any of the six grandchildren of the settlor, who were born between the date of the settlement and his death, or to the grandchildren born since.

LYNDHURST.

J. BAYLEY.

W. BOLLAND.

J. GURNEY.

BADDLEY v. OLIVER.

ASSUMPSIT for goods sold, work and labour, and materials, &c. Plea—the general issue, with notice of set-off. The cause came on for trial at the last *Stafford* Assizes, when it was referred to a gentleman at the bar, with power to certify, and who accordingly certified that a verdict should be entered for the plaintiff for 1*l.* 9*s.* 1*d.* damages.

On a former day in this term, *Campbell* obtained a rule calling on the plaintiff to shew cause why the defendant should not be at liberty to enter a suggestion on the roll, to deprive the plaintiff of costs, pursuant to the 47 *Geo. 3*, c. 36, s. 12.

Where a Judge, at the trial, in pursuance of the 1 *Will. 4*, c. 7, orders that the plaintiff shall have execution within a limited time, and judgment is thereupon entered up and execution is issued, the defendant is not precluded from applying to the Court above, to enter a suggestion to deprive the plaintiff of costs, under an act for a local Court of Re-

quests, provided he comes to the Court within the first four days of the next Term.

Semble, that the amount found by the verdict of the jury, and not the sum which the plaintiff claims to be due, is to be considered the debt for which the action is brought, and by which the Court are to decide whether the plaintiff ought to have sued in the Court of Requests.

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The 47 Geo. 3, c. 36, intituled, "An Act for the more easy and speedy recovery of small debts within the parishes of *Hales Owen, Rowley Regis, Harborne, West Bromwich, Tipton*, and the manor of *Bradley*, in the counties of *Worcester, Salop, and Stafford*," erects a Court of Requests for those districts, to be held at *Oldbury*, in the parish of *Hales Owen*, for the recovery, by any person, of debts not exceeding the value of 5*l.*, due or owing to the plaintiff by or from any other person or persons whomsoever, inhabiting, residing, or being within the limits of the said several parishes and manor, or either of them, or keeping or using any house, warehouse, wharf, &c., or frequenting any market, or seeking a livelihood, or in any way trading or dealing within the same; and by section 29, it is enacted, "that, if any action or suit for any debt recoverable by virtue of this Act in the said Court of Requests shall be commenced in any other Court whatsoever, or elsewhere than in the said Court of Requests (except the Court of the Lord of the Manor of *Hales Owen*), then and in every such case the plaintiff or plaintiffs in such action or suit shall not, by reason of a verdict for him, her, or them, or otherwise, have or be entitled to any costs whatsoever."

The affidavits upon which the above rule was obtained, stated, that the writ was sued out for the sum of 13*l.* 2*s.* 4½*d.*; that the cause went down to trial at the last *Stafford Assizes*; when it was agreed between the plaintiff's attorney and the defendant's attorney, to refer the cause to a gentleman at the bar, to certify what verdict should be returned; and that, upon entering into such agreement, it was stipulated by the plaintiff's attorney that the plaintiff should not be delayed in obtaining execution, if a verdict was entered for the plaintiff; and a month's time was proposed by the plaintiff's attorney, which was assented to by the defendant's attorney; that the parties attended the reference, and that the plain-

tiff's demand was, thereupon, reduced from the sum of 13*l.* 2*s.* 4½*d.* to the sum of 4*l.* 1*s.* 1*d.*, and the defendant's set-off was reduced from the sum of 7*l.* 8*s.* to the sum of 2*l.* 12*s.*, leaving a balance to the plaintiff of 1*l.* 9*s.* 1*d.*; and that the arbitrator certified that a verdict should be entered for the plaintiff for that amount; that the defendant's attorney then objected that the plaintiff was not entitled to costs, but the arbitrator said that question was not left to him; that, in pursuance of the previous agreement not to delay the plaintiff in his execution, the defendant's attorney signed a consent that the Judge should certify that the plaintiff should be at liberty to issue execution within a week from that time, and that the Judge certified accordingly; that a writ of *ca. sa.* was afterwards issued against the defendant for 62*l.* 14*s.* 5*d.*, which was accordingly paid under protest; that the defendant had, for the last seventeen years, resided, and still continued to reside, in the parish of *Tipton*, and within the jurisdiction of the Court appointed by the 47 *Geo.* 3, c. 36, commonly called the *Oldbury* Court of Conscience Act, and that the debt due to the plaintiff was recoverable in the said Court of Requests.

The affidavits in answer stated, that the defendant's attorney, having applied at the Assizes to the learned Judge to rescind his certificate, on the ground that the plaintiff was not entitled to costs, that question was heard on affidavits before Mr. Justice *Bosanquet*; and that he, after reading the affidavits of both parties, and looking at the record and the act of parliament for the establishment of the *Oldbury* Court of Requests, refused to make any order for rescinding his certificate, giving the plaintiff liberty to issue execution within a week for his debt and costs. The plaintiff's affidavit stated that the sum really due from the defendant to him, at the commencement of the action, was 12*l.* 7*s.* 8½*d.*, as set forth in the particu-

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lars of his demand; and that there remained the sum of 8*l.* 16*s.* 7½*d.* justly due from the defendant to him, the plaintiff, after allowing a deduction of the sum of 4*l.* 1*s.* 1*d.* allowed by the arbitrator.

R. V. Richards and *Follett* now shewed cause.—First, this case does not come within the act; but, 2ndly, even if it did, the party has precluded himself from taking advantage of it by entering into arrangements with the plaintiff; and, 3rdly, the application is at all events too late, final judgment having been signed, and execution issued under the certificate of the learned Judge. This action was brought to recover the sum of 13*l.* 12*s.* 4*d.*, as that was the sum claimed on the copy of the writ, and, therefore, it is not within this act, the words of which are, “if any action for any debt recoverable in the said Court of Requests (which is any debt under 5*l.*) shall be commenced in any other Court,” the plaintiff shall not be entitled to costs. This action was, therefore, commenced for a sum not recoverable in this Court of Requests. There were claims on both sides, and the arbitrator reduced the claims of both parties. But the accounts were confused and complicated; and a letter of the defendant’s attorney expressly says, “the accounts are so complicated, a jury will never get to the end of them.” The plaintiff swears positively in his affidavit, that more than 12*l.* was due to him at the commencement of the action. [*Bayley*, B.—We are to consider the demand, not according to what you claim, but according to the amount which you prove—that has been expressly held in *Shaddick v. Bennett* (a).] It would be a great hardship that a plaintiff who sues *bond fide* for a debt which he believes to be due, should be deprived of his costs; because, from some cause over

(a) 4 B. & C. 769; S. C. 7 D. & R. 229.

which he has no control, he fails to prove his full demand. And it is submitted that it is a point for this Court now to determine on these affidavits, whether the plaintiff did not *bond fide* commence his action for a larger sum than 5*l*. The verdict of the jury would not shew the amount proved to be due to the plaintiff, because it might be reduced by set-off, which would not appear. But this act does not apply where the sum claimed is reduced by cross demands. The 28th section provides, "That this act shall not extend to any debt for any sum being the balance of an account on demand originally exceeding the sum of 5*l*." Here there were demands on both sides, and the plaintiff's affidavit expressly states that more than 5*l*. was due, and the defendant's affidavit does not contradict it, but states only what the arbitrator found. But, secondly, this application is in breach of good faith; both parties agreed to refer the cause, and that the Judge should certify that the plaintiff should be at liberty to issue execution in a month. Both parties ought to be estopped by this arrangement. Even if both were ignorant of the provision in this act respecting the costs, it is too late now for one party to take advantage of it. The defendant first applied to the arbitrator, but he declined to make any order about costs, as that question was not referred to him. An application was then made to Mr. Justice *Bosanquet* to rescind his certificate, that the plaintiff should be at liberty to sue out execution in a week. On that occasion, the local act was brought expressly before the learned Judge, and both parties were heard upon affidavits; but the learned Judge refused to rescind his certificate. That could only be on the assumption that the local act did not apply to this case; and that was the opinion of the learned Judge, formed upon mature consideration. No application was made to him to enter a suggestion. [*Bayley*, B.—What authority had Mr. Justice *Bosanquet* to enter a suggestion?] The

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whole matter was referred to him: a consent was given for immediate execution, which was accordingly issued, and the sheriff has now the money in his hands. If the learned Judge had no authority to enter a suggestion, the stat. 1 *W. 4*, c. 7, s. 2, gives him power to certify for immediate execution; and the learned Judge having so certified, and the plaintiff having, under that certificate, taxed his costs, signed judgment, and issued execution, it is too late afterwards to move for a suggestion to be entered on the roll: for the defendant cannot apply to enter a suggestion after final judgment. That was the rule before the stat. 1 *W. 4*, c. 7; and it is so laid down in *Tidd's Practice* (a). Under the 2nd section of that act, the Judge at *Nisi Prius* has clearly jurisdiction to determine, under all the circumstances, when the plaintiff shall have judgment; the defendant applied to him to stay final judgment until an application could be made to this Court. Mr. Justice *Bosanquet* entertained that question with reference to the *Oldbury* Court of Requests' Act, and he decided against the application. The provision in the 4th section of the 1 *Will. 4*, c. 7, makes the argument stronger, because there the Act has provided for particular cases; but this is not one of the cases enumerated. There is no power to apply to enter a suggestion under the old law in any case after final judgment is signed; and the 4th section of the recent statute does not apply to this particular case. The words of that section are, "Provided always, that, notwithstanding any judgment signed or recorded, or execution issued by virtue of this Act, it shall be lawful for the Court in which the action shall have been brought, to order such judgment to be vacated and execution to be stayed, or set aside, and to enter an arrest of judgment, or grant a new trial or new writ of inquiry, as justice may appear to require; and

(a) Vol. 2, p. 961.

thereupon the party affected by such writ of execution shall be restored to all that he may have lost thereby, in such manner as upon the reversal of a judgment by writ of error, or otherwise, as the Court may think fit to direct." This Court, therefore, has no power now to order a suggestion to be entered.

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Campbell, contra.—There is no rule of law clearer than this, that, where a defendant applies, on the Court of Conscience Acts, to enter a suggestion, the Courts look to the verdict of the jury, and that is conclusive as to the amount. If the verdict is wrong, the plaintiff should have moved to set it aside. Secondly, with respect to the time at which the application is made—Formerly, if a party did not apply to the Court until after judgment signed, he was too late; *Watchorn v. Cook* (a); where it is said that the party should apply to the Court as soon as he can. But, if judgment were to be signed in a week, pursuant to this act of parliament, the party could have no opportunity of coming to the Court before the signing of the judgment. This statute was not intended to repeal all the Court of Conscience Acts, or to place it in the power of a single Judge to prevent the defendant from getting the benefit of them. The defendant has now, as before, the usual number of days in the next term to make the application. The 4th section is in general terms, and a general power is given to the Court to vacate the judgment. This Court has therefore authority to order a suggestion to be entered. [He was then stopped by the Court.]

BAYLEY, B.—I think the rule for entering a suggestion ought to be made absolute. The statute 47 *Geo. 3*, c. 36, s. 29, provides, that, if any action for any debt recoverable by virtue of that act in the said Court of Requests shall be commenced in any other Court whatsoever, the plain-

(a) 2 M. & S. 348.

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tiff, by reason of a verdict for him, shall not be entitled to any costs whatsoever. And, therefore, the question is, whether this action was for a debt recoverable in this Court of Requests. That act authorizes suits for any debt under 5*l.*: the sum here recovered is 1*l.* 9*s.* 1*d.*: it was reduced to that sum by a set-off; the original sum sought to be recovered appears, by the evidence, to have been 4*l.* 1*s.* 1*d.* It has been held, and acted upon in this Court, that the amount of the verdict is to be taken as evidence of the amount of the debt. If that were not so, we should always be trying the matter on contradictory affidavits. It is said that the defendant is precluded by two circumstances: first, that he originally agreed that execution should issue on a day in *August* last, at which time, however, he was probably not aware of the provisions of the local act. If a party knows his rights, and acts with full knowledge of them, he is undoubtedly bound; but, if the party were ignorant of this act of Parliament at the time he entered into the arrangement, it would be hard to say that he must be considered as having waved his right. Another objection is, that Mr. Justice *Bosanquet* has already decided this question. But was the question within his jurisdiction? If you refer a matter to an arbitrator, his decision is final; but, if you refer it to a Judge, it is in his judicial capacity; and it is our duty to see whether he was warranted in coming to the conclusion at which he arrived. It has been said that it is too late now to enter a suggestion; but I cannot put that construction on the act of 1 *Will.* 4, c. 7. What was the evil before that act? Before that act was passed, the plaintiff was prevented from having execution until after the first four days of the next term, so that the defendant had four days to enter a suggestion; and, therefore, if he comes here within that time, he is not too late. Here the defendant has come at the earliest time to the only Court that could act, and this Court can give him the relief he prays, notwithstanding the 4th section

of the 1 *Will.* 4, c. 7, as to vacating judgments in particular cases, which are only put as instances.

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BOLLAND, B.—I am of the same opinion; I think we ought to look to the finding of the Jury to see what was the debt recoverable. I think that the observations, as to the 1 *Will.* 4, c. 7, s. 4, are fully answered by the fact, that this motion was made within the first four days of this term.

GURNEY, B.—I am of the same opinion. Here the case presented to the arbitrator was a claim for 4*l.* 1*s.* 1*d.*, and, therefore, it appears to me, that this is a case within the meaning of the local act. If the plaintiff had thought proper he might have been nonsuited, but he chooses to take the verdict. I do not say that the Court will not in any case resort to other means of information than the verdict.

Rule absolute for entering a suggestion.

—◆—
JOHN v. JENKINS.

REPLEVIN—There were four counts in the declaration: the two first for a seizure on the demised premises, and the two last for a seizure off the land demised. The defendant, as to the two first counts, avowed for rent in arrear, averring the demise to be at the annual rent of 7*l.* 15*s.* As to the two last, the defendant avowed, stating the same demise, and averring that the goods had been fraudulently removed from the demised premises to avoid a distress.

Landlord and tenant, between whom there was a subsisting tenancy, agreed in writing for a letting of the farm upon different terms, the amount of the rent to be settled by valuation, and the tenant to find sureties for his

paying the rent. The amount was not settled, and the sureties were not given:—*Held*, that the instrument, although it contained words of present demise, did not operate as a lease, or alter the terms of the existing tenancy.

A plea, to an avowry, of a tender of 16*l.* will not be supported by proof of a tender of 15*l.* 16*s.*, although no more rent was due than the sum proved to have been tendered.

Semble, that it is a question for the jury, whether a removal was fraudulent within the statute 11 *Geo.* 2, c. 19, although it be admitted at the trial by the tenant that the removal was to avoid a distress.

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The plaintiff, to the avowries as to the two first counts, pleaded — *First, Non tenuit*; — *Secondly, Riens in arriere*; — *Thirdly, Riens in arriere* beyond 16*l.*, and a tender of that sum. And, to the avowries to the two last counts, he pleaded the same pleas; and, also, traversed the fraudulent removal.

At the trial, before *Bolland, B.*, at the Spring Assizes for the county of *Carmarthen*, it appeared, that, previous to an agreement, dated *July 29th, 1829*, the plaintiff had been tenant to the defendant, on the terms stated in the avowries. That agreement was in these terms:—

“An agreement made between *Esau Jenkins, of &c.*, and *David Jones, of &c.*, about *Llettyr Neuadd* farm, from year to year. He, the said *Esau Jenkins*, lets this farm to *David Jones* at the valuation of two disinterested persons to be chosen by each of them; and the said *David Jones*, when leaving the said farm, is to leave the crop of the farm behind at the valuation of two persons, to be chosen by each of them. *David Jones* further agrees to give four loads of lime to every five *Winchesters* of barley he sows in every field he lays down. *David Jones* further agrees to leave the meadow land not laid down without the consent of the landlord. *David Jones* also agrees to keep the houses in repair, and to have timber towards that as long as they can be had on the farm. *David Jones* is to give two sureties to answer for the rent: and he also agrees to do nothing to injure *Esau Jenkins* as to his lease. The above valuation is to take place in determining the rent for 1829 and the time to come.

“Signed in the presence of us, who have hereto put our names as witnesses:—

John Watkins.

Esau Jenkins.

D. Davies.

David John.

James Silvanus.

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The arbitrators chosen in pursuance of this instrument failed to agree, and no rent was fixed, nor were any sureties given. But it was contended, for the plaintiff, that the old tenancy was thereby determined, and that, consequently, as the avowries, being framed on the terms of that tenancy, could not be supported, the plaintiff was entitled to a verdict on the issues joined on *non tenuit*: and of that opinion was the learned Baron; and a verdict was accordingly entered on those issues for the plaintiff.

With respect to the issues joined on the tender, it appeared at the trial, that, instead of 16*l.* (the sum averred), in fact only 15*l.* 16*s.* was tendered; but it also appeared, that no more rent than the latter sum was due. Upon this evidence the learned Baron directed a verdict to be entered on these issues for the defendant.

As to the issues respecting the fraudulent removal, it was admitted by the plaintiff's counsel, that the removal was to avoid the distress; but he put it to the jury, that, under all the circumstances proved respecting the removal, the tenant removed the goods on the belief that the landlord had no right to distrain, because the old lease was determined, and the rent of the new tenancy had never been fixed; and that, therefore, he was not guilty of any fraudulent intention, but acted merely in the *bond fide* exertion of his supposed rights. The counsel for the defendant objected to such a mode of putting the case to the jury, contending, that, after the admission of the plaintiff's counsel, there was no question at all for the jury on these issues. However, the learned Baron left it to the jury to say whether the plaintiff had any fraudulent intention, they negatived the fraud by their verdict, which was then entered on these issues for the plaintiff.

A question was also raised at the trial (on behalf of the plaintiff) whether the enactment (a) against fraudulent remo-

(a) 11 Geo. 2, c. 19.

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vals extended to the present case, inasmuch as, although the distress was made after the 29th of *September*, when the rent became due, yet the removal took place two days before, *viz.* on the 27th *September*. But this point became immaterial when it was discussed in this Court, as it turned out, on reading the Judge's notes, that in fact some arrears of the *Lady-day* rent remained due (a).

In *Easter Term*, *John Evans* obtained a rule to shew cause why a verdict should not be entered for the defendant on all the issues. And *Whitcombe* obtained a cross rule for entering a verdict for the plaintiff on the issues joined on the pleas of tender.

Campbell and *Whitcombe* for the plaintiff.—As to the issues on the pleas of tender, the substance of those pleas is, that the plaintiff had tendered all the rent really due; and the sums averred are immaterial. It appeared in evidence that the tender actually made covered all the rent then due, and therefore the pleas were substantially proved. As to the issues on *non tenuit*, the first lease was surrendered by operation of law, by the agreement of *July*, 1829, which substituted a new tenancy on fresh terms, which were not in accordance with the avowries. As to the fraudulent removal, the case was properly left to the jury. The question whether fraud or not is a question of fact, which must always be decided by their verdict.

John Evans and *E. V. Williams*, for the defendant. The prior tenancy was not determined by the instrument of *July*, 1829, for, if it amounts to a lease, it was inadmissible in evidence, not being stamped as such; and if it is an agreement only, then it has no effect, because it was never

(a) This point has been decided in the negative by the Court of *King's Bench*, in *Northfield v. Nightingale*, *Trin. Term*, 1832.

completed by the terms of the tenancy being ascertained. Therefore, the issues upon *non tenuit* must be found for the defendant. As to the fraudulent removal, whenever a tenant removes his goods for the purpose of avoiding a distress, that is in itself a fraudulent removal within the meaning of the statute. And it is not competent for a jury to inquire further into the motives of the removal. It may well be admitted that there must always be, in such cases, a question of fact for the jury, *viz.* whether the removal was to avoid a distress or not. But, in the present case, that fact was admitted, and therefore nothing remained into which the jury ought to inquire.

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Cur. adv. vult.

BAYLEY, B., now delivered the judgment of the Court. —In this case there were two questions. It was an action of replevin, in which there were three sets of issues arising out of six avowries, and four sets arising out of six others; there being three sets of pleas on six of the avowries, and four sets of pleas to the other six. The first set of issues were upon pleas of *non tenuit*, and raised the question whether the plaintiff held as tenant. The second were upon pleas of *riens in arrere*, and raised the question whether any rent was due; and the third were upon pleas of tender of the sum of 16*l.*: and upon the fourth set of issues arising out of the six last avowries, the question was, whether the goods taken had been fraudulently removed in order to avoid a distress for rent. At the trial the jury found for the plaintiff upon the issues of *non tenuit*, and *riens in arrere*, and on the fraudulent removal; and for the defendant on the issues as to the tender; and we think that the issue as to the tender was rightly found. It was arranged that the propriety of the finding should be submitted to the consideration of this Court, and that this Court should make such order as in their discretion

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they should think fit. There was a motion on the part of the defendant, and a rule granted to shew cause why the verdict found for the plaintiff upon the issues of *non tenuit, riens in arriere*, and the fraudulent removal, should not be set aside, and a verdict entered for the defendant on those issues; and there was also a cross rule obtained by the plaintiff to set aside the verdict found for the defendant, upon the issues as to the tender of 16*l.*, and to enter a verdict for the plaintiff upon those issues. The question upon the latter rule is easily disposed of. The pleas allege a tender of the sum of 16*l.*, but it is incumbent upon a party pleading a tender to be accurate in his plea, and to prove a tender to the full amount stated: and, as the evidence made out a tender of 15*l.* 16*s.* only, the verdict was rightly found.

The next question is, whether the issues upon the *non tenuit* were rightly found, which question depends in effect upon the agreement of *July*, 1829, because there is no doubt that the plaintiff held the premises of the defendant on such terms as corresponded with some of the avowries in answer to the first two counts, unless the terms of his former tenancy were altered by that agreement. Part of the rent claimed was due at *Lady-day*, 1829, and the residue in *September*, 1829. No doubt the plaintiff was bound by the terms of the original tenancy, unless he was extricated by the agreement of the 29th of *July*, 1829.

The declaration contained four counts, two describing the seizure upon the demised premises, and the other two off the demised premises, and, what is singular and somewhat irregular, the plaintiff complained of seizing the same goods on and off the premises. The question, however is, whether the defendant is entitled to have a *retorno habendo* awarded in respect of the seizure, either on or off the demised premises; and if he be so entitled, the plaintiff's having made a double claim cannot prejudice the defendant. If the tenancy is made out according to

any of the avowries, in answer to the counts which charge a taking on the demised premises, the defendant will be entitled to a return of the goods.

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Now, it being clear, that, previously to *July*, 1829, the plaintiff had held the premises upon the terms set out in some of the avowries, we come to the question whether those terms were altered. On consideration, we are all of opinion that the terms of the original tenancy were never altered, but that the plaintiff continued to hold, up to *September*, 1829, upon the same terms as he had held from *September*, 1827. An objection was taken to the reading of the document, by which it was contended, that the terms were altered, because it was said to be a lease. If it had been a lease, the objection would have been valid, as it bore only an agreement stamp. It is a question whether it amounts to a lease or an agreement; for, if it is an agreement only, and not carried into effect, it leaves things in *statu quo*. It begins with the words "An agreement;" but if, looking at its contents, we should find it to be a lease, the mere introduction of the word agreement would not make it an agreement only. "An agreement &c., about *Llettyr Neuadd* farm, from year to year—he, the said *Esau Jenkins*, lets this farm to *David Jones*." These are words of present demise; but we must look at the residue of the paper to see if this is an actual demise, or substantially only an agreement. "At the valuation of two disinterested persons, to be chosen by each of them." There is to be a valuation before it can operate as a lease. Then comes this provision, which is very important, and, in my mind, shews that it was never intended to operate as a lease at all events, but to operate as an agreement only—" *David Jones* is to give two sureties to answer for the rent;" and then comes the provision that the valuation is to determine the rent for the year 1829, and for the time to come. It seems to me, then, that this was a negotiation for a lease only,

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and was not to operate as a lease, except there was a valuation, and except, after that had taken place, security should be given for the rent by two sureties on the part of the plaintiff. In point of fact there was no valuation, and no sureties were given; and instead of continuing to hold as tenant, the plaintiff quitted the farm and removed his goods. If we were to look at this as if it had been carried into effect, it would vary the rent for the year 1829, as well as the succeeding years; but as it was not carried into effect, the agreement fell to the ground in the same manner as if there had been no such agreement, and the plaintiff continued tenant upon the same terms of holding as before. We therefore think, that, upon the pleas of *non tenuit* and *riens in arriere*, upon some one of the avowries applicable to the terms of the original tenancy, there ought to be a verdict for the avowant.

Upon the other question, of the fraudulent removal, my Lord *Lyndhurst* and my brother *Bolland* agree with me in thinking that it was a question for the jury, and that they were justified in their finding; my brother *Vaughan* thinks that he should have drawn a different conclusion. For myself, I think that we should not be justified in sending it again to a jury. I think it would be a waste of expense to send the case down again for trial on these issues. It is very clear, that, upon two of the counts, the defendant is entitled to succeed; and we are, therefore, of opinion that the defendant should be at liberty to enter a verdict upon any one of the avowries he may think fit, upon the pleas of *non tenuit* and *riens in arriere*; and that the verdict upon the plea of tender should be found for the defendant.

Rule accordingly.

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DOR d. MORGAN MORGAN v. MARY MORGAN.

EJECTMENT to recover possession of a house and garden in the village of *Mothvey*, in the county of *Carmarthen*. On the 4th of February, 1816, *Evan Morgan*, of the parish of *Mothvey*, being seised in fee simple of several houses and gardens in the parish of *Mothvey*, made his will, containing the following devise: "I give unto my dear wife, *Elinor Morgan*, the part of my house and the part of my garden where *Morgan David Morgan* and *Elizabeth Walter* dwelleth, unto her during her natural life; and after her decease to my nephew, *Morgan Morgan*, and his right heirs. Also I give and bequeath unto my nephew, *Morgan Morgan*, of the village of *Mothvey*, the part where I dwell, and likewise the part of my garden which I do now occupy, to him and his right heirs, after my decease. Also the house in my yard, I give to the above said *Morgan Morgan* after my decease. Also I order the above *Morgan Morgan* to pay unto my sister, *Gwen Price*, of the parish of *Cilycwm*, the sum of 2*l.* a-year and every year, for the term of five years, from the above said houses; and in default of payment, that she is authorized to levy and distress for the same, every half-year, on what I bequeathed to the said *Morgan Morgan* after my decease. Also I give my nephew, *Benjamin Morgan*, that part of my house and garden where he dwells, unto him and his right heirs, after my decease."

Soon after the execution of this will, the testator, *Evan Morgan*, died, leaving *Morgan Morgan* (the eldest son of his only brother, *Benjamin Morgan*, deceased, who resided in the village of *Mothvey*, and who was his heir-at-law) and *Morgan Morgan*, the lessor of the plaintiff, (who was a son of a sister of the testator's, and who lived near *Merthyr Tydfil*, in *Glamorganshire*) and *Benjamin Mor-*

A testator, by his will, after giving certain premises to his wife, for life, devised as follows: "And after her decease to my nephew, *Morgan Morgan*, and his right heirs. Also, I give and bequeath unto my nephew, *Morgan Morgan*, of the village of *Mothvey*," (certain premises therein mentioned) "to him and his right heirs, after my decease." It appeared that the testator had two nephews, of the name of "*Morgan Morgan*," one of whom resided at the village of *Mothvey*, and the other elsewhere. *Semble*, that, upon proof of this fact, a latent ambiguity was raised, and that parol evidence of declarations of the testator, contemporaneous with the making of the will, was admissible to explain that ambiguity.

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gan, a brother of the latter *Morgan Morgan*, his only three nephews, him surviving.

On the testator's death, his widow, *Elinor Morgan*, took possession of the house and garden devised to her for life, and *Morgan Morgan*, the nephew, who lived at *Mothvey*, took possession of the remainder of the testator's property devised by his will, except the portion of it devised to *Benjamin*.

This *Morgan Morgan* died in 1831, without issue, having made a will devising all his property to his wife, *Mary Morgan*, the defendant; and, on his death, the defendant became possessed of all the premises devised by his will; and which, with the exception of the premises devised by *Evan Morgan* to *Benjamin*, and the house and garden devised to his widow, *Elinor*, and then in her possession, were the whole subject-matter of *Evan Morgan's* will. The said *Elinor Morgan* afterwards died; and, on her death, the defendant entered into possession of the house and garden held by the said *Elinor Morgan*.

This ejectment was now brought by the lessor of the plaintiff, *Morgan Morgan*, being, as before mentioned, a nephew of the testator, *Evan Morgan*, to recover the premises first mentioned in his will.

On the trial of the cause before *Alderson, J.*, at the last assizes for the county of *Carmarthen*, evidence of the state of the family of the original testator, *Evan Morgan*, and of the existence of his two nephews, named *Morgan Morgan*, having been elicited, it was insisted, on the part of the defendant, that a latent ambiguity was raised; and that, consequently, parol evidence was admissible to explain it. The learned Judge was of this opinion; and, evidence of *Evan Morgan's* declarations, contemporaneous with the will, having been received, a verdict passed for the defendant.

John Evans, now moved for a new trial, on the ground

of the inadmissibility of such evidence. He urged, that, as the second devise in the will was to a *Morgan Morgan*, therein described as "of the village of *Mothvey*," whereas, the devise in question was to "*Morgan Morgan*," *simpliciter*, the will, on the face of it, carried the respective premises to different parties. There were, therefore, distinct objects of the testator's bounty, satisfying the terms of the will; and, that being so, there was no necessity for extrinsic evidence; and therefore parol evidence ought not to have been received. *Doe v. Westlake (a)* is in point.

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The Court took time to consider; and, after conferring with the learned Judge who tried the cause,

Refused the rule (b).

(a) 4 B. & A. 57.

(b) See *Abbot v. Massie*, 3 Vez. 148.

WILKINSON v. MALIN.

GOULBURN, Serjt., had obtained a rule *nisi* for the Master to review the taxation of costs in this case. Amongst the items objected to, was a charge for a good jury upon the execution of a writ of inquiry.

Since rule 101, Hil. Term, 2 W. 4, the costs of a good jury upon the execution of a writ of inquiry are allowed on taxation.

Adams, Serjt., and *Humfrey* shewed cause.

Goulburn, Serjt., in support of his rule, cited *Dax on Costs*, 63, to shew that the costs of a good jury upon the execution of a writ of inquiry ought not to have been allowed.

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The Master certified to the Court, that since the rule 101, *Hil. Term, 2 Will. 4 (a)*, the practice had been to allow those costs.

Lord LYNTHURST, C. B.—Before the late rule, the obtaining a good jury was the act of the party—the granting such a jury is now entirely in the discretion of a Judge.

Rule discharged as to the above item.

(a) “There shall be no rule for the sheriff to return a good jury upon a writ of inquiry; but an order shall be made by a Judge, upon summons for that purpose.”

BAKER v. WILLS.

Where an affidavit to hold to bail for several causes of action is defective as to some of them, it will be bad *in toto*, so as to entitle the defendant to be discharged out of custody on filing common bail.

IN this case the affidavit to hold to bail, upon which the defendant was arrested, stated that the defendant was justly and truly indebted to the plaintiff in the sum of 609*l.* 3*s.* in manner following, that is to say, in the sum of 500*l.* on the bond of the said defendant, bearing date the 18th day of *February*, 1829; in the penal sum of 1000*l.* for securing to the plaintiff the sum of 500*l.* and lawful interest, payable at a certain day then past; and in the further sum of 50*l.* on a certain mortgage, or conditional surrender, bearing date on or about the 12th day of *December*, 1829, and made by the said defendant to the use of the said plaintiff; and in the further sum of 10*l.* for the principal, due on a certain promissory note of hand, drawn by the said defendant, payable to the plaintiff at a certain day then past; and also in the further sum of 44*l.* 9*s.* 6*d.* for interest due on the said sums of 500*l.*, 50*l.*, and 10*l.*; and

also in the sum of *3l. 7s. 6d.* for money paid, laid out, and expended by the plaintiff for the defendant, and at his request; and also in the further sum of *1l. 6s.* for goods sold and delivered by the plaintiff to the defendant, and at his request; which said several sums of *500l., 50l., 10l., 44l. 9s. 6d., 3l., 7s. 6d.,* and *1l. 6s.* made, in the whole, the said sum of *609l. 3s.*

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Platt having obtained a rule to shew cause why the defendant should not be discharged out of custody, on entering a common appearance, on the ground that the affidavit did not shew that the *50l.* secured by the mortgage or conditional surrender was due,

Thesiger shewed cause.

LORD LYNDRHURST, C. B.—As no case has been cited in which, where the affidavit was defective as to part, it has been held good for the other part, the rule must be made—

Absolute, the defendant undertaking to
bring no action (a).

(a) See also *Kirk v. Almond*, 2 C. & J. 354.

LOWE v. ELDRED.

DECLARATION in *assumpsit*, on a promise to pay the debt of a third person. Plea—that there was no agreement, or any memorandum or note thereof in writing, signed by the defendant, or any person by him lawfully authorized. Replication—that there was such an agreement in writing; concluding to the country. Demurrer, and joinder in demurrer.

To an action on a promise to pay the debt of a third person, the defendant pleaded that there was no agreement in writing. *Sem- ble*—that the plaintiff must, in his replication, set out the agree- ment; and that he cannot take issue upon the plea.

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Mansel, in support of the demurrer, was stopped by the Court, who intimated a strong opinion that the plaintiff ought to have set out the agreement in his replication; and thereupon—

Kelly obtained leave to amend.

WILKINSON v. MALIN.

This Court will not give a party leave to *nonpros* his own writ of error without payment of costs.

GOULBURN, Serjt., applied on behalf of the defendant for leave to *nonpros* a writ of error brought by the defendant, without payment of costs; and he cited *Milborn v. Copeland* (a) to shew that a defendant had a right to *nonpros* his own writ of error; and *Salt v. Richards* (b), to shew that, under the statute 3 *Hen.* 7, c. 10, no costs are allowable where a writ of error is *nonprossed* before the record is transcribed.

Per Curiam.—If you have a right to *nonpros* it you must do so at your peril. If you cannot do it without the leave of the Court, it seems reasonable, that you should pay the other party the expenses to which you have put them.

Rule refused.

(a) 1 M. & S. 104.

(b) 7 East, 111.

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EARL OF STIRLING *v.* CLAYTON.

THE plaintiff declared, as the Right Honourable *Alexander*, Earl of *Stirling*, against the defendant for a libel. The second count of the declaration, after the general inducement of previous good fame, averred, that *before and at the time* of the committing of the several grievances by the defendant, *the said plaintiff was and still is Earl of Stirling*, as aforesaid, and was and is rightly entitled to create baronets of *Nova Scotia*, and was and is entitled to make grants of certain lands in *Canada*, to wit, at &c. Nevertheless, the defendant, well knowing, &c., but contriving and intending to injure, &c., and to cause it to be suspected and believed that the plaintiff was not Earl of *Stirling*, and was not entitled to make baronets of *Nova Scotia*, and to make grants of lands in *Canada*, theretofore, to wit, on &c., at &c., falsely and maliciously did compose and procure to be published, of and concerning the plaintiff, and of and concerning his being Earl of *Stirling*, as aforesaid, and of and concerning his being entitled to create baronets of *Nova Scotia*, as aforesaid, and to make grants of lands in *Canada*, a certain false, scandalous, malicious, and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the plaintiff, and of and concerning his being Earl of *Stirling*, and of and concerning his being entitled to make baronets of *Nova Scotia*, and to make grants of lands in *Canada*, as aforesaid, that is to say—"Lord *Roseberry* has obtained a committee for regulating the right of voting at the election of *Scotch* Peers. It was, indeed, time that the house should take notice of some recent proceedings respecting *Scotch* titles, as the following facts will prove. A certain gentleman, of the name of *Bankes*, has persuaded himself, and endeavoured to persuade the public, that one Mr.

The plaintiff declared as Earl of *S.*; the defendant pleaded in abatement that the plaintiff was not Earl of *S.*—*Held*, that the plaintiff, in his replication, was bound to shew *how* he claimed the dignity.

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Humphreys (meaning the said plaintiff), a *ci-devant* school-master who has assumed the name of *Alexander*, is legally Earl of *Stirling* (thereby, then and there, meaning the said plaintiff), by virtue of a pedigree which is more than doubtful, and under a patent which has not been enrolled. He has further asserted, in divers pamphlets, that the said Earl of *Stirling* (meaning the said plaintiff) possesses the right to create baronets of *Nova Scotia*; and in return for having conferred the honour of an earldom on his *protégé*, (thereby, then and there, meaning the said plaintiff), the said Earl (meaning the said plaintiff) has exercised his royal prerogative in favour of Mr. *Bankes*, who, consequently, styles himself Sir *Thomas Bankes*, Bart. of *Nova Scotia*. It is even said that the Earl (thereby, then and there, meaning the said plaintiff) and his new created baronet, profess to grant lands in *Canada*; but this, we suppose, is to be received as report only. Those who have any idea of settling in *Canada* will do well to inspect their titles narrowly." By means of which, &c.

The defendant pleaded in abatement as follows—And the said *Joseph Clayton*, against whom the plaintiff in this suit hath exhibited his said bill, by the style and title of *Alexander*, Earl of *Stirling*, in his own person comes and says, that, *at the time of exhibiting his, the plaintiff's, said bill, he, the plaintiff, was not, nor now is, Earl of Stirling*, and this he is ready to verify; wherefore he prays judgment of the said bill, and that the same may be quashed.

Replication.—And the said plaintiff saith, that the said bill, by reason of any thing by the said defendant in the said plea above alleged, ought not to be quashed, because he says, that the said plaintiff *was and still is Earl of Stirling* in manner and form *as is above alleged*. And this the said plaintiff prays may be inquired of *by the country*, &c. To this there was a demurrer, assigning for cause, amongst other things, that the plaintiff had not, in

his said replication, set forth how and by what means, and in what manner, his supposed right to the said dignity of Earl of *Stirling* had accrued to him, the plaintiff, and had not shewn to the Court, in his said replication, how, and in what manner, he himself, or any ancestor of his, attained to the said dignity, nor set forth whether or not he is Earl of *Stirling*, by creation, or by writ, or by descent, or how otherwise..

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Hill, in support of the demurrer.—The replication concluding to the country is bad. It ought to shew how the dignity is claimed. If the plaintiff were created by writ, that would be matter of record, and would appear on the production of the record. If he were created by patent, the letters patent ought to have been set forth, and then the defendant might have rejoined *non concessit*, which would be triable by the letters patent. If the plaintiff claimed by descent, it would be a matter triable by the country. In all cases where a party affirms, in pleading, that he has a dignity, he must set forth how he acquired that dignity. All the precedents are so. In *Blackmore v. The Earl of Wigtoun* (a) the defendant pleaded in abatement; and the plea set forth the letters patent, and concluded, as by the said letters remaining of record appears. It must be intended that the plaintiff claims to be an *English* Earl. The defendant cannot safely take issue on this replication; the ground of the demurrer is, that it cannot be ascertained, without shewing how the dignity is claimed, whether the conclusion to the country is right or wrong. In *Rex v. Cooke* (b) all the authorities are collected. There the defendant pleaded in abatement, that he was Lord *Stafford*, Baron *Stafford*; and Mr. Justice *Bayley* there says—"In this case the defendant was bound to shew, not only his right to a peerage, but also, how he de-

(a) 3 Wentworth, 275.

594. See the judgment of Mr.

(b) 2 B. & C. 871; 4 D. & R.

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rived that right." In the Countess of *Rutland's* case (a), the note says "duke or not duke, earl or not earl, baron or not baron, shall *not* be tried by the country, but by record; for, if they be lords of parliament, it appears by record, and, therefore, by record, *viz.* the king's writ, it ought to be certified." And in Lord *Abergavenny's* case (b), it is said, "If issue be taken whether a baron or not, earl or not, this shall not be tried *per pais*, but by the record by which it appears that he was a peer of parliament; for, without matter of record, he cannot be a peer of parliament." And in the Countess of *Shrewsbury's* case (c), it is said—"If a baron, earl, or other lord of parliament, and peer of the realm, be plaintiff in any action, and the defendant will plead that he is not a baron, &c., as he is named in the writ, this shall not be tried by a jury, but *by the record* in the *Chancery*, which imports itself solid truth." Suppose the defendant were to join issue, would he not be allowed to shew himself to be an earl of *England, Ireland, or Scotland*? [Lord *Lyndhurst*, C. B.—Should not the plaintiff have stated how earl in his replication? Does it not import an *English* earl?]

Platt, contrà.—At all events the plea is bad, as it gives no better writ. [Lord *Lyndhurst*.—How can they do that? *They* cannot give you your real name. *Bayley*, B.—It lies in your knowledge; the rules of pleading do not require impossibilities.] As it is expressly averred in the declaration that the party is Earl of *Stirling*, the defendant ought to have pleaded in bar, and not in abatement (d). If, however, this is to be treated as a plea of misnomer, *Alexander* Earl of *Stirling* may be one name, like *Jonathan*, otherwise *John Soans*, in the case of *Scott v. Soans* (e), where the Court held that *Jonathan*, other-

(a) 6 Co. 53.

(b) 12 Co. 71.

(c) 12 Co. 94.

(d) It is singular that this plea

in abatement amounts, in effect, to a justification of the truth of the libel.

(e) 3 East, 111.

wise *John*, might be one Christian name. If this name be so considered, the plea properly concludes to the country. [Lord *Lyndhurst*, C. B.—We cannot shut our eyes to this being treated as a dignity. It is *Alexander* Earl of *Stirling*. The plea treats it as a dignity, and the replication adopts that. It must mean a peer of the realm. *Bayley*, B.—If it did not mean a dignity of the realm, the plaintiff would be described as *A. B.*, commonly called Earl of *Stirling*.]

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LORD LYNTHURST, C. B.—It is treated in the declaration, plea, and replication, as a dignity. It is treated in the declaration as an *English* name of dignity; for, if not, the plaintiff would have been properly described by his Christian and surname: Because the same thing is repeated in the body of the declaration, it does not take away the defendant's right to plead in abatement.

BAYLEY, B.—In ordinary cases the general rule is, that a plea in abatement ought to give a better writ; but there is another rule, which is this, that where a matter is peculiarly in the knowledge of one party, that party must state it in pleading. Now here the plaintiff must know how he claims this dignity, and the defendant cannot be expected to state how he ought to be described.

Leave to amend, upon payment of costs.

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DOUBLE v. GIBBS.

Where the master of a vessel, trading between London and Rotterdam, was, in the course of his trade, in the habit of coming with his vessel to a particular wharf, and there unloading his cargo, which was deposited in a warehouse there, and a fresh cargo taken in; and who purchased necessities for the vessel in London, but had no residence, or counting-house, or warehouse, in London, in his own occupation:—*Held*, that he was not entitled to be sued in the London Court of Requests.

Semble, that an action for use and occupation is not within the exception in the 39 & 40 Geo. 3, c. 104, s. 11.

ASSUMPSIT.—The declaration contained a count for use and occupation.

Bompas, Serjt., on a former day had obtained a rule for entering a suggestion on the roll, to deprive the plaintiff of costs under the 39 & 40 Geo. 3, c. 104, s. 12, (the London Court of Requests' Act,) on the ground that the plaintiff had recovered less than 5*l.* in an action brought in this Court.

It appeared from the affidavits, that the defendant's dwelling-house was in *Horsley-down*, in the Borough of *Southwark*; that he was the master of a vessel trading between London and Rotterdam; that on his arrival in the Port of London, he always came with his ship to *Brewer's Quay Wharf*, in the City of London, where he unloaded his vessel; that he remained there whilst his vessel was unloading and taking in a fresh cargo, and that he remained there sometimes three days for that purpose, at other times not more than twenty-four hours; that the cargoes which he was in the habit of bringing in his vessel were deposited in a warehouse at *Brewer's Quay*; that whilst he was in London, he bought necessities for the supply of the vessel during her voyage. But it appeared, that the vessel was never in dock in London, but was moored near the quay; and that the warehouse at *Brewer's Quay* was in the occupation of other persons, and not of the defendant.

Comyn shewed cause.—The declaration in this case contains a count for use and occupation; which brings the case within the exception in the Act. *Tidd's Practice*, 9th edition, 958, where it is said, that the exception in the London Act has been extended to an action for use and occupa-

tion; and *Woolley v. Cloutman* (a), *Holden v. Newman* (b), *Each. of Pleas, 1832.* are there referred to. The last Act only extends the jurisdiction in the amount, and does not alter the exception in the statute. [*Bayley, B.*—The words are, “that this Act shall not extend to any title of freehold, or lease for years, of any lands or tenements, which shall come in question, or to any debt by specialty, &c.” This exception does not appear to me to include an action for use and occupation.] Then the defendant does not reside within the jurisdiction of the *London* Court of Requests; he has not any counting-house at *Brewer’s Quay*; and the warehouse there is in the occupation of another person. [*Bayley, B.*—Does this defendant seek his whole livelihood in the City of *London*?] The defendant is only master of a vessel trading between this country and *Holland*; he has no counting-house here; all he does is the loading and unloading of his vessel at *Brewer’s Quay Wharf*, and his residence is in *Horsley-down*, in the Borough of *Southwark*. In *Reeves v. Stroud* (c), the cases are reviewed by Mr. Justice *Taunton*; and it is said that the defendant must obtain his entire livelihood in the City of *London*, to bring himself within the statute; and *Kemsett v. West* (d) is there referred to.

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Bompas, Serjt., contra.—In *Croft v. Pitman* (e), it was held, that a coal-merchant who had his wharf and counting-house in *Southwark*, and occupied half a counting-house in *London* for the purposes of his trade, was within the Act. [*Bayley, B.*—There he had a place for carrying on business in the City of *London*.] It is not necessary, within the words of this act, that the defendant should seek his whole livelihood in the City of *London*. In *Bushnell v. Levi* (f), a sheriff’s officer, who resided and carried

(a) Douglas, 244-5.

(b) 13 East, 161. This case was decided on the present act, 39 & 40 Geo. 3, c. 104.

(c) 1 Dow. Pr. Rep. 399.

(d) 5 D. & R. 626.

(e) 5 Taunt. 648.

(f) 5 Bing. 315; 2 M. & P. 577.

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on his business in *Middlesex*, but who had also an office in *London*, was held "to seek his livelihood" in *London*, within the meaning of the act. It was so held, also, in *Fleming v. Davies* (a). [Lord *Lyndhurst*.—There the defendants had a place to carry on their business in the City of *London*, and actually did carry on their business there.] The words of the act are, "any person gaining a livelihood, or keeping a shed, stall, or stand." It is submitted that the case falls within these words in the act. [Bayley, B.—Then every captain of a coasting vessel who constantly comes to the same wharf is within the act.]

LORD LYNDHURST, C. B.—In this case the party has no residence or place of business in *London*; and, if that were not necessary, I am not satisfied that he even deals, by buying and selling on his own account. He buys goods merely as agent for the owners of the vessel.

BAYLEY, B.—I am clearly of opinion that the defendant is not within the act.

BOLLAND, B.—I am of the same opinion. Here, the defendant gets his living by conveying goods between *London* and *Rotterdam*; and when he is here, his vessel is moored on the *Thames*. The case falls expressly within *Stephens v. Derry* (b), where Lord *Ellenborough* says, "In order to entitle a party to be sued in *London* by seeking his livelihood within the City, he should seek the whole of his livelihood there, and not be in a state of vagrant existence for this purpose; seeking it partly within and partly without the City."

GURNEY, B., concurred; and the rule was—

Discharged.

(a) 5 D. & R. 371.

(b) 16 East, 148.

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WILKS and Another v. HEELEY.

DEBT on bond.—The defendant set out the bond and condition on *oyer*; by which it appeared that the bond was from one *George Tugwell*, a collector for the liberty of *Old-street*, in the division of *Finsbury*, nominated and appointed by the commissioners acting for the parish of *St. Luke*, in the division of *Finsbury*, in the county of *Middlesex*, in the execution of the acts relating to assessed taxes (*a*), and the defendant and one *James Foster*, as his sureties, to the plaintiffs, being two of the commissioners acting in the execution of the said acts for that division.

The condition (after reciting that *Tugwell* had been duly appointed collector, and that one of the duplicates of assessments had been delivered and given in charge to him) was, that if the said *George Tugwell*, *Joseph Heeley*, and *James Foster*, or either of them, should duly pay, in pursuance of the directions of the said statutes, all such sum or sums of money assessed in and to be collected in the said liberty by the said *George Tugwell* as such collector as aforesaid; and if the said *George Tugwell* should duly, in pursuance of the said acts, demand the sums assessed of the respective persons from whom the same were payable, and in case of non-payment should duly enforce the powers of the said acts against such who should make default, the bond should be void.

To this the defendant pleaded *non est factum*, and three other pleas, upon which issue was joined, and upon which no question now arose.

The 5th plea of the defendant stated, that although divers sums of money, amounting in the whole to a large

To a declaration upon a bond given by a collector of assessed taxes and his sureties, the defendant, a surety, pleaded pleas, shewing that the commissioners and receiver-general had not taken the steps to enforce payment from the collector, as directed by the acts relating to the assessed taxes:—*Held*, on general demurrer, that these pleas were bad.

A plea that the commissioners have not seized the lands, &c. of the collector, must shew that there were lands, &c. of the collector, which might have been seized, and sold to supply the deficiency.

(*a*) 43 Geo. 3, c. 99; 48 Geo. 3; 52 Geo. 3; 59 Geo. 3; 1 Geo. 4, c. 73; 1 & 2 Geo. 4, c. 113; 3 Geo. 4, c. 50; and 3 Geo. 4, c. 88.

AND WHEREAS BY THE SUM OF ONE THOUSAND POUNDS,
 THE SAID SUM OF ONE THOUSAND POUNDS, AND PAID TO THE SAID *George Tugwell*,
 AS SUCH COLLECTOR AS AFORESAID, OF THE DUTIES GIVEN TO HIM
 IN CHARGE AS AFORESAID, AND ALTHOUGH THE SAID SUM OF MO-
 NEY WAS COLLECTED AND PAID TO THE SAID *George Tugwell*, AS
 SUCH COLLECTOR AS AFORESAID, WAS HERETOFORE, TO WIT, ON THE
 1ST DAY OF NOVEMBER, IN THE YEAR OF OUR LORD, 1830, IN
 AFRONT OF THE SAID SUM OF ONE THOUSAND POUNDS AFORESAID; YET THE
 SAID SUM OF ONE THOUSAND POUNDS WAS NOT PUT IN EXECUTION THE
 ACT OF PARLIAMENT MADE AND PASSED IN THE FORTY-THIRD YEAR
 OF THE REIGN OF OUR SAID MOST GRACIOUS KING *George the Third*, INTI-
 TLED "AN ACT FOR CONSOLIDATING CERTAIN OF THE PROVISIONS
 CONTAINED IN AN ACT OF 1793 RELATING TO THE DUTIES UNDER
 THE MANAGEMENT OF THE COMMISSIONERS FOR THE AFFAIRS OF
 TRADES AND OF AMENDING THE SAME," OR ANY TWO OR MORE OF
 THEM RELATING TO THE PARTS OF *St. Luke*, IN THE DIVISION OF
Finsbury, IN THE COUNTY OF *Middlesex*, BEING THE LIBERTY
 AND DIVISION IN WHICH THE SAID *George Tugwell* WAS SO
 NOMINATED AND APPOINTED TO ACT AS SUCH COLLECTOR, AS AFORE-
 SAID, DID NOT NOR WOULD THEY, THAT IS TO SAY, ON THE 1ST DAY
 OF NOVEMBER, IN THE YEAR OF OUR LORD, 1830, AND THE 1ST
 DAY OF MAY, IN THE YEAR OF OUR LORD, 1831, CALL BEFORE
 THEM THE SAID *George Tugwell*, SO BEING SUCH COLLECTOR AS
 AFORESAID, AND EXAMINE HIM UPON OATH OR SOLEMN AFFIRMA-
 TION, AND ASSURE THEMSELVES OF THE SUM OR SUMS OF MONEY
 THAT HAD BEEN COLLECTED AND PAID TO THE SAID *George Tug-
 well* AS SUCH COLLECTOR, AND THE SAID DUTIES SO GIVEN TO HIM
 IN CHARGE AS AFORESAID, NOR DID NOR WOULD THEY THE SAID
 COMMISSIONERS, NOR ANY TWO OR MORE OF THEM, ASSURE THEM-
 SELVES OF THE SUM OR SUMS IN ARREAR AS AFORESAID, AND THE
 CAUSE OR CAUSES THEREOF; OR EXAMINE THE SAID *George Tug-
 well*, SO BEING SUCH COLLECTOR AS AFORESAID, UPON OATH OR
 AFFIRMATION TOUCHING THE DUE PAYMENT OVER OF CERTAIN SUMS
 OF MONEY, AMOUNTING IN THE WHOLE TO A LARGE SUM OF MO-
 NEY, TO WIT, THE SUM OF ONE THOUSAND POUNDS COLLECTED BY

him in the preceding part of the said year, 1830; but the said commissioners then and there wholly neglected and refused so to do, and wrongfully and injuriously neglected to observe and perform the requisites and duties imposed upon them by the said statute in that case made and provided; and by means of the said several last-mentioned premises, he the said defendant lost and was deprived of the benefit and protection provided by the said statute for and on the behalf of persons who, after the passing of the said statute, might become sureties for the conduct of a collector of the said duties so given to him the said *George Tugwell* in charge as aforesaid.

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The 6th plea stated, that although a large sum of money, to wit, the sum of one thousand pounds, did, during the year ending on the 5th day of *April*, in the year of our Lord, 1831, come to the hands of the said *George Tugwell* as such collector as aforesaid, which said sum of money ought, before the expiration of the said year, to have been paid by him the said *George Tugwell*, as directed by the statute in such case made and provided; yet the receiver-general of the said taxes, rates, and duties of the said county of *Middlesex* did not, nor would, call upon and hasten the said *George Tugwell* to make payment of the same upon the days and at the times appointed for the payment thereof by the said statute in that case made and provided; nor did nor would the said receiver-general cause the same to be levied by warrant under the hands and seals of two or more of the said commissioners, upon the said *George Tugwell*, as directed by the statute in such case made and provided; but on the contrary thereof, the said receiver-general then and there wholly neglected and refused so to do.

The 7th plea stated, that although the said *George Tugwell* did, during the year ending the 5th day of *April*, in the year of our Lord, 1831, receive a large sum of mo-

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ney, to wit, the sum of one thousand pounds, as such collector as aforesaid; and although he, the said *George Tugwell*, did afterwards, to wit, &c. when requested to pay the said sum of money so received by him as such collector as aforesaid, as directed by the statute in that case made and provided, wholly neglect and refuse to pay the same; yet the said commissioners appointed to put in execution the said Act of Parliament made and passed in the forty-third year of the reign of his late majesty, king *George the Third*, intituled, "An Act for consolidating certain of the provisions contained in any act or acts relating to the duties under the management of the commissioners for the affairs of taxes, and for amending the same," or any two or more of them acting in or for the parish of *St. Luke*, in the division of *Finsbury*, in the said county of *Middlesex*, being the liberty and division for which the said *George Tugwell* was so appointed to act as such collector as aforesaid, did not nor would imprison the person, or seize the estate, either real or personal, of the said *George Tugwell*, to him belonging; but on the contrary thereof, wholly neglected and refused so to do, and wrongfully and injuriously neglected to observe and perform the requisites and duties imposed upon them by the said statute in that case made and provided, and by means, &c., (concluding as in the fifth plea).

The 8th plea stated that the commissioners appointed to put in execution the said act of Parliament, made and passed in the forty-third year of the reign of his late Majesty King *George the Third*, intituled "An Act for consolidating certain of the provisions contained in any act or acts relating to the duties under the management of the commissioners for the affairs of taxes, and for amending the same," or any two or more of them acting in and for the parish of *St. Luke*, in the division of *Finsbury*, and in the county of *Middlesex*, being the liberty and division for which the said *George Tugwell* was so appointed to act as

such collector as aforesaid, did not, nor would deliver, or cause to be delivered, one of the duplicates of the assessments allowed by the said commissioners appointed to put in execution the said act of Parliament, or any two or more of them, together with warrants under the hands and seals of two or more of the said commissioners for collecting the same unto the respective persons by them nominated to be collectors under and by virtue of the said statute.

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The 9th plea stated, that the said receiver-general of the said taxes, rates, and duties of the said county of *Middlesex*, did not, nor would, nor did nor would his deputy or deputies, authorized under the statute in that case made and provided, at the respective times appointed by the statute in that case made and provided for the delivery of schedules of defaulters, administer an oath or solemn affirmation to the said *George Tugwell*, so being such collector as aforesaid, that he had fully paid all the sums by him collected or received of or for the assessed taxes; and had fully accounted for all sums not collected or received, in the schedule or schedules previously delivered by him the said *George Tugwell* as such collector as aforesaid, but then and there wholly refused and neglected so to do.

The 10th plea stated, that although the said *George Tugwell* did, whilst he was such collector as aforesaid, reside within ten miles of an office for the daily or weekly receipt of the taxes, established pursuant to a certain act of Parliament, made and passed in the 3rd year of the reign of our late sovereign lord *George* the Fourth, intituled "An Act to amend the laws relating to the land and assessed taxes, and to regulate the appointment of receivers-general in *England* and *Wles.*" And although divers monies of the said taxes, amounting in the whole to a large sum of money, to wit, the sum of 1000*l.*, had been previously received by the said *George Tugwell*, as such collector as aforesaid, the accounts whereof had not been

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previously examined by the said commissioners of the said district, for which the said *George Tugwell* had been so appointed such collector as aforesaid. Yet the receiver-general of the district, where the said office was so situate as aforesaid, did not nor would require the said *George Tugwell*, so being such collector as aforesaid, to account with him the said receiver-general for the said sums of money so received by the said *George Tugwell*, as such collector as aforesaid. Nor did nor would he, the said receiver-general, require the said *George Tugwell*, so being such collector as aforesaid, to be examined on his oath or affirmation touching the sums so collected as aforesaid; but, on the contrary thereof, the said receiver-general then and there wholly neglected and refused so to do.

The 11th plea stated, that the said *George Tugwell* was not duly nominated to act as a collector by the commissioners appointed for putting in execution the said act of Parliament, made and passed in the 43rd year of the reign of his late Majesty King *George* the Third, intituled "An Act for consolidating certain of the provisions contained in any act or acts relating to the duties under the management of the commissioners for the affairs of taxes, and for amending the same," as in the condition of the said writing obligatory mentioned.

The 12th plea stated, that although the commissioners appointed to put in execution the said act of Parliament, made and passed in the 43rd year of the reign of his late Majesty King *George* the Third, intituled "An Act for consolidating certain of the provisions contained in any act or acts relating to the duties under the management of the commissioners for the affairs of taxes, and for amending the same," had received notice, as directed by the statute in such case made and provided, of a receipt, to be holden by the receiver-general, of the monies collected and received within the limits of the district of

the said commissioners. Yet, the said commissioners did not, nor would, on or immediately before the day of such receipt to be so holden as aforesaid, call before them the said *George Tugwell*, so being such collector as aforesaid, and examine him upon solemn oath or affirmation, and assure themselves of all and every of the sum or sums of money, and arrears of the said duties and compositions respectively, that had been collected, or remained to be collected, and which were payable to the said receiver-general, or his deputy, or such other person or persons authorized to receive the same at such ensuing receipt, under the statute in that case made and provided; nor did nor would they, the said commissioners, make any order therein for the payment of the same to the receiver-general, or his deputy, or other person or persons authorized to receive the same, as aforesaid; but, on the contrary thereof, they, the said commissioners, wholly neglected and refused so to do.

To all these pleas there was a general demurrer, and joinder in demurrer.

Follett, in support of the demurrer.—The object of the pleas is to shew that the commissioners have not strictly performed their duty, and the effect of holding the pleas to be good, would be, that the crown would suffer because the provisions of the acts of Parliament, which are merely directory, have not been strictly complied with. The condition of the bond has no reference to the performance of the commissioners' duty, but to the performance of the duty of the collector, and the bond is forfeited if the collector has not performed his duty. [Lord *Lyndhurst*, C. B.—The duty of the commissioners pointed out in the first of these pleas is merely imposed for the purpose of their ascertaining the amount in the hands of the collector. Can the neglect of that duty preclude them from suing on the bond?] In the *Trent Na-*

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igation v. Harley (a), it was held, that the laches of obligees in a bond (conditioned for the principal obligor to account for and pay over from time to time all such tolls as he should collect for the obligees), in not properly examining their accounts for eight or nine years, and not calling upon the principal for payment so soon as they might have done for sums in arrear or unaccounted for, is not an estoppel at law in an action against the sureties. And, in *Nares v. Rowles (b)*, where, on a bond with a condition reciting that the principal obligor, with his sureties, became bound as collectors of duties assessed under the 43 Geo. 3, to the commissioners acting for the district under that statute, for the due collection and payment of those duties to the receiver-general, it was held, that such bond might be put in force against one of the sureties, though he were not apprized of the default of the collector in not paying over duties collected by him, nor called upon for an indemnity by the commissioners till after the dismissal from office of such collector. All the provisions referred to in these pleas (except the 7th) are for the purpose of enabling the commissioners to ascertain the amount in the hands of the collector. The 7th plea is drawn on the wrong section, namely, the 52nd, which authorizes and empowers the commissioners to imprison the person and seize and secure the estate of the collector, and which is framed to guard the revenue against the default of the collector. It ought to have been founded on the proviso in the 13th section, "That no such bond shall be put in suit against any surety or sureties for any deficiency other than what shall remain unsatisfied after the sale of the lands, tenements, goods, and chattels of the collector;" and then such a plea should have shewn some lands or tenements, sold or unsold, out of which the deficiency might be satisfied. As the bond is not to be put in suit for any de-

(a) 10 East, 34.

(b) 14 East, 510.

ficiency other than what shall remain unsatisfied after the sale of the lands, &c., the defendant, to raise this point, should have distinctly averred that there were lands, tenements, goods, chattels, &c. of the collector which might have been seized and sold to supply the deficiency. All the other pleas are founded on the directory powers given to the commissioners. The effect of upholding these pleas would be, that if the commissioners have not done their duty the crown is to suffer. The 11th plea is, that he was not duly appointed collector; and the 8th, that the duplicates were not delivered; but the defendant is estopped by the recital in the condition of the bond from disputing those facts. He cannot plead against his own deed.

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Bompas, Serjt., contra.—It is admitted that the two pleas last referred to, that is, the 8th and the 11th, cannot be maintained, being contrary to the terms of the bond. [*Bayley, B.*—They cannot be maintained unless you can shew that the condition was illegal.] The 7th plea, as to not averring that there were lands, tenements, &c., may be amended, if necessary, by supplying an express averment to that effect. [*Bayley, B.*—Are the facts so? *Lord Lyndhurst, C. B.*—We must have an affidavit stating that such is the fact. There is not the slightest reason for coming to the conclusion that the fact is so.] There is another class of pleas here which are good pleas. The public are interested in having good sureties, and if these clauses are not to furnish a protection to sureties, the facility in obtaining such security would be lessened.

The fact of the commissioners being public officers makes no difference in favour of the plaintiff as against the sureties who contract with them. It is a different question whether they, as public officers, are liable for a breach of duty. The condition refers to the statute in the same way as if the statutes were inserted in the bond, and the defendants

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have a right to refer to them as a part of their defence. Many of these provisions are for the benefit of sureties. It is the same as if the sureties had said—If these directions are observed, we will be answerable. The words of the condition are, “shall duly pay in pursuance of the directions of the statutes.” [Lord *Lyndhurst*, C. B.—Is not the collector bound to pay, though he is not called upon? *Bayley*, B.—In general, in an action on a bond, the party pleads performance of the condition of the bond. Now, what is the condition here?—That you shall duly pay all sums of money collected, and duly demand the sums assessed; and, in default of payment, shall duly enforce the powers of the acts.—Now, do you say you have done any one of these?] The directions as to what the commissioners are to do form part of this contract. The defence is founded on the 39th section, which provides “that, at the end of every quarter of a year, appointed for the payment of the sums assessed, or any part thereof, or within one calendar month thereafter, or at such other times as they shall think expedient, but, nevertheless, twice at least, viz. on or before the 1st of November, and the 1st of May following, in every year,” the commissioners “shall, and are hereby empowered and required, to call before them the collector or collectors, and to examine him or them on oath or solemn affirmation, and assure themselves of the sum or sums of money that shall have been collected and paid to such collector or collectors of the duties given to them in charge, and to make such order therein for the payment of the same to the receiver-general, on the day or time appointed for receiving the same, as they shall judge necessary.” It is the same as if it were part of the contract that the commissioners should call the collector before them. [*Bayley*, B.—Even if that were so, you should have shewn performance up to a given period. Does the subsequent neglect to call the collector to account excuse the prior non-performance

on his part? You may plead performance of the whole, or excuse yourself from the performance of the whole; or performance of a part, and excuse the performance of the residue. Here the collector is to demand the sums assessed, as well as pay the money collected. Lord *Lyndhurst*, C. B.—Consistently with your plea there might have been a breach of this bond before the neglect on which you rely. In every view of these pleas they are bad. It was *Tugwell's* duty to demand. If he does not, the bond is forfeited.] The 9th plea is on the 3 *Geo.* 4, c. 88. That act differs in this respect, that the collector is not bound to pay before the receipt-days; the commissioners are to examine him before those days, and he is to pay on those days. The last plea is, that the commissioners did not call the collector before them, and require him to pay. [Lord *Lyndhurst*, C. B.—How does that answer the not demanding; a default in that respect may have been committed before.] By the 3 *Geo.* 4, c. 38, Regulation No. 4, the commissioners are *required*, whenever they shall have received notice, as directed by that act, of any receipt, to be holden by the receiver-general, of the monies collected and received within the limits of the district of the said commissioners respectively, on or before the days of receipt to be so holden, to call before them the collectors, and examine them on oath as to all sums of money and arrears of the duties and compositions respectively, that shall have been collected, and to make an order for the payment of the same to the receiver-general. They cannot say that the collector has made default before they call him before them. *Bayley*, B.—Before the 3 *Geo.* 4, had he no obligation to pay? Though the collector was never called before the commissioners, he is bound to attend before the receiver-general, and to account, by the 49th section. Lord *Lyndhurst*, C. B.—Look at the second rule—That directs that every collec-

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tor residing within ten miles of an office for the daily or weekly receipt of taxes, shall once in every intervening quarter, when required by the receiver-general of the district, account with the said receiver-general, and be examined on oath by him, "unless the accounts of the monies received by such collector shall have been previously examined by the commissioners of the district." It is quite clear it is not necessary to go before the commissioners.] There is a difference between accounting and paying. [*Bayley, B.*—The receiver attends to receive, the collector is to account; must he not pay over? A plea that a man has accounted, without saying that he has paid over, is a bad plea.

Lord LYNTHURST, C. B.—The accounting must necessarily include receiving. What does the receiver go for, but to receive the money from the collectors? If the collector is there and accounts, he must pay; the account is to be taken before the receiver; the account ascertained is to be paid over.

Leave to amend the 7th plea, by inserting an averment that there were lands and goods of the collector to satisfy the deficiency, if the fact were so.

END OF MICHAELMAS TERM.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

HILARY TERM, IN THE THIRD YEAR OF WILL. IV.

REGULA GENERALIS.

1833.

IT IS ORDERED that in case a rule of Court, or Judge's order for returning a bailable writ of *capias* shall expire in vacation, and the sheriff, or other officer having the return of such writ, shall return *cepi corpus* thereon, a Judge's order may thereupon issue, requiring the sheriff or other officer, within the like number of days after the service of such order, as by the practice of the Court is prescribed with respect to rules to bring in the body issued in term, to bring the defendant into Court, by forthwith putting in and perfecting bail above to the action; and if the sheriff, or other officer, shall not duly obey such order, and the same shall have been made a rule of Court in the term next following, it shall not be necessary to serve such rule of Court, or to make any fresh demand

Order on sheriff to bring in the body of defendant in vacation.

thereon; but an attachment shall issue forthwith for disobedience of such order, whether the bail shall or shall not have been put in and perfected in the meantime.

T. DENMAN.	J. PARKE.
N. C. TINDAL.	W. BOLLAND.
LYNDHURST.	J. B. BOSANQUET.
J. BAYLEY.	W. E. TAUNTON.
J. A. PARK.	E. H. ALDERSON.
J. LITTLEDALE.	J. PATTESON.
S. GASELEE.	J. GURNEY.
J. VAUGHAN.	

EXCHEQUER CHAMBER.

BALME and Others, Assignees of BANKHART and BENSON, Bankrupts, *v.* HUTTON, Esq., JEWISON, Esq., INGHAM, WOOD, and Others.

1833.

[*In Error from the Court of Exchequer (a)*].

A sheriff who, under a writ of *fiat facias*, seizes and sells goods of a bankrupt before commission, but after an act of bankruptcy, without notice of the act of bankruptcy, is liable in trover.

THIS case was brought by writ of error into the *Exchequer Chamber*, and was there argued in the vacation after last *Trinity Term*, by *Starkie*, for the plaintiffs, and by *F. Pollock*, for the defendants. There being a difference of opinion amongst the Judges, they now delivered their opinions *seriatim*.

PATTESON, J.—This was an action of trover, in which the jury found a special verdict, as follows:—

“*C. Bankhart* and *William Benson*, the bankrupts, for several years before, and up to the time of the issuing the

(a) See this case in the Court of *Exchequer*, reported 2 Cr. & Jerv. 19.

commission hereinafter mentioned, carried on the business of worsted spinners in partnership, at *Bowling*, within the honour of *Pontefract*, in the county of *York*. On the 27th day of *October*, 1825, *Bankhart* and *Benson* were indebted to the defendants, *H. W. Wood*, *J. W. Wood*, and *M. W. Wood*, in a sum of money exceeding 3,500*l.* for wool sold and delivered; and upon that day, at the request of the said Messrs. *Wood*, executed a warrant of attorney for securing that sum and such further advances as in the whole should amount to a sum not exceeding 5,000*l.*; which warrant of attorney was filed within twenty-one days from the date thereof, pursuant to the statute 6 *Geo.* 4, c. 16; and judgment by *nil dicit* was entered up thereon on the 14th *November* following.

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"On the 31st *December*, 1825, the said *C. Bankhart* and *Wm. Benson*, being traders, and indebted to the petitioning creditor in a debt sufficient to support the after-mentioned commission, committed an act of bankruptcy.

"On the 25th *January*, 1826, the defendant, *Ingham*, (*Jewison* then being chief bailiff of the honour of *Pontefract*, within which honour he has the execution of all writs, and appoints his own deputies, from whom he takes bonds with sufficient sureties to indemnify him from the acts of such deputies), by virtue of a warrant directed to *Jewison* and his deputy, (defendant *Ingham*), by defendant *Hutton*, the then sheriff of the county of *York*, founded on a writ of *feri facias* issued at the suit of the said defendants, *H. W. Wood*, *J. W. Wood*, and *M. W. Wood*, against the said bankrupts under the judgment aforesaid, returnable on *Monday* next after eight days of the *Purification*, and indorsed, to levy 1,521*l.* 12*s.* 10*d.*, besides, &c., seized in execution certain machinery and utensils of the said bankrupts, in a mill occupied by them at *Bowling* aforesaid.

"On the same day, a valuation of the said machinery and utensils, together with the said bankrupts' tenant-right in the said mill, was made by the defendant *Ingham*, amount-

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ing altogether to the sum of 1,485*l.*; and the said machinery and utensils, and tenant-right, were on that day purchased at such valuation from the said *Ingham*, acting on behalf of the said chief bailiff, by one *Barker*, a clerk or book-keeper of the said Messrs. *Wood*; but no money was paid by *Barker* or *Wood* to *Ingham*, except the Sheriff's poundage, and other costs of the levy.

"Immediately upon the sale, *Barker* took possession of the mill, machinery, and utensils, on behalf of Messrs. *Wood*, and retained possession until the 17th *February* following, when the machinery and utensils were sold by public auction for the sum of 964*l.* 14*s.* 6*d.* (the tenant-right in the mill remaining unsold, but being of little or no value); and the proceeds of such sale were paid over by *Barker* to Messrs. *Wood*.

"On the day of the sale to *Barker*, Messrs. *Wood* agreed to indemnify the defendant *Ingham* from any action for making the levy; and a bond of indemnity was afterwards executed.

"On the 21st *February*, 1826, a commission of bankrupt issued against *Bankhart* and *Benson*, under which they were declared bankrupts on the 24th day of the same month.

"Neither the Sheriff, nor the chief bailiff, nor *Ingham*, knew or had any notice of any act of bankruptcy by *Bankhart* and *Benson* before the return of the writ of *feri facias*."

The special verdict then proceeded to find *Jewison* and *Ingham* guilty or not according to the opinion of the Court; and it then found *Hutton* not guilty, and *Wood* and the other defendants guilty.

The Court of *Exchequer* has given a very elaborate judgment; and has decided that the verdict should be entered for the defendant *Jewison*, and against the defendant *Ingham*. Upon which judgment a writ of error has been brought.

The decision against the defendant *Ingham* proceeds on the ground, that he, being the bailiff who executed the writ of *feri facias*, took an indemnity from the execution-creditor, and is, therefore, identified with him. But the Court held, that the defendant *Jewison*, the chief bailiff, whose officer *Ingham* was, is not affected by this circumstance. I confess, it appears to me, as at present advised, that if *Ingham* be identified with the execution-creditor, in consequence of what he has done in the course of executing the writ, *Jewison* is so likewise. *Jewison* would be liable for all acts done by *Ingham* as officer, even for any extortion committed by *Ingham*, although contrary to his express orders; *Jewison* can have the benefit of the indemnity taken by *Ingham*, and is, in my apprehension, exactly in the same condition as *Ingham*. However, as the other point in the case is the most important one, I will proceed to examine it, having stated only thus much on the point of indemnity, lest I should be supposed to agree with the Court of *Exchequer* upon it.

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The principal question then is this:—Is a sheriff liable to an action of trover at the suit of the assignees of a bankrupt, where, upon a *feri facias* against a trader who has committed a secret act of bankruptcy, of which the sheriff is wholly ignorant, he seizes and sells?

I am of opinion that he is liable. It has been so considered for a great length of time; and though I admit that the case of *Cooper v. Chitty*, reported in 1 *Burr.* 20, and much more intelligibly, as I think, in Lord *Kenyon's* notes, 395, does not necessarily decide the point; because, in that case, the sheriff sold the goods after a commission of bankrupt had issued; yet the general understanding of the profession has long treated that case and the subsequent practice as decisive of this question. Accordingly, in the case of *Lazarus v. Waithman* (a), the Court of *Common Pleas* ex-

(a) 5 B. Moore, 313.

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pressly so held; and in that case the old authorities, and particularly *Bailey v. Bunning* (a), were cited by counsel. Afterwards, in *Price v. Helyar* (b), the Court of *Common Pleas* again decided in the same manner on the same ground; and, according to the report in *Moore & Payne*, the counsel for the defendant cited *Bailey v. Bunning*. The Court of *Exchequer* had also held the same doctrine some time before, in the case of *Potter v. Starkie*, cited in 4 *M. & S.* 260, and also in *Lazarus v. Waithman*. I do not think it necessary to enter into a full examination of the reasoning of Lord *Mansfield*, in *Cooper v. Chitty*. I agree in much, though not in all, that is said on that subject, in the judgment of the Court of *Exchequer* in this case; but I dissent from the conclusion which is drawn in that judgment.

Looking at the subsequent authorities, and at the uniform practice in modern times, I cannot consider this question as *res integra*, and should not think myself justified in overruling the decisions of so many learned Judges, even if I felt that, in the absence of such decisions, my view of the law would probably be different. But I by no means say that it would be different. The first authority, *viz. Bailey v. Bunning*, is cited as having determined the point the other way. Now, if I am not bound by the several modern decisions on the subject, I certainly am not bound by the authority of *Bailey v. Bunning*, badly and imperfectly reported as it is in *Levins*, in *Siderfin*, and in *Comberbach*, and impossible as I find it to satisfy my mind on what ground the Court, in that case, really did proceed.

The special verdict in that case, which was an action of trover against the judgment-creditor and the bailiff of a liberty having the execution of writs, is plainly imperfect; for it finds only a demand and refusal, but not a conver-

(a) 1 *Lev.* 173.

(b) 1 *M. & P.* 541; *S. C.* 4 *Bing.* 597.

sion—whereas it is common learning that a demand and refusal are evidence only of a conversion, and that the jury must themselves draw the conclusion. Again, the verdict puts the question on the *taking*; and, according to the Reports, it should seem that the Court proceeded on the ground that the *taking* was not unlawful; which is frequently not the real point in trover—for the taking may be lawful, and yet there may be a subsequent unlawful conversion. [The learned Judge here referred to the translation of the special *postea* from the original roll in *Bailey v. Bunasing*, which had been procured for the Judges (a).] The

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(a) The following is the finding of the jury here referred to—And the jurors say, upon their oath, that the said *W. Mawley* is not guilty of the premises within laid to his charge; as the said *W. Mawley* has within, for himself, in pleading, alleged; and the jurors aforesaid, upon their aforesaid oath, further say, that the said *W. Mawley*, in *Trinity Term*, in the fourteenth year of the reign of our Lord *Charles the Second*, the now King of *England*, in the Court of the *Bench* of our said Lord the King, at *Westminster*, by the consideration of the said Court, recovered against one *John Eaton* a certain debt of 152*l.*; also 60*s.* for the damages, &c., as by the record, &c.; and the jurors aforesaid, on their aforesaid oath, further say, that on the sixth day of *June*, in the above-mentioned fourteenth year of the reign of our said Lord the now King &c., at &c., the said *John Eaton* became a bankrupt, within the several statutes against bankrupts made and provided, and

that the said *John Eaton* then and there was possessed of the monies, goods, and chattels, in the within count mentioned; and the aforesaid jurors, upon their said oath, further say, that a writ of *fiery facias* of our said Lord the now King, directed to the sheriff of *Northampton*, issued from the said Court of the *Bench* at *Westminster*, upon the judgment aforesaid, by which writ also it was commanded the said sheriff of *Northamptonshire*, that of the goods and chattels of the said *John Eaton*, in his bailiwick, he should cause to be made, as well the aforesaid debt of 152*l.*, which the said *W. Mawley*, in the said Court of *Common Bench*, at *Westminster*, before the Justices of that Court, recovered against him, as the aforesaid 60*s.*, which were adjudged, &c.; and that he should have those monies before the Justices of our Lord the King at *Westminster*, in three weeks from the day of *St. Michael* then next ensuing, to render to the aforesaid *William* for his debt

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verdict is general; not guilty as regards the execution-creditor: and rightly so, for it is not found that he interfered

and damages aforesaid; and which writ is tested at *Westminster*, the fourth day of June, in the fourteenth year aforesaid, but, in truth and in fact, the same writ was actually made and issued out of the same Court, the *eleventh day of June* in the same year, being in the *vacation* after *Trinity Term* in the same year, and not before; and the aforesaid Jurors, upon their said oath, further say, that afterwards, and before the return of the said writ of *fieri facias*, to wit, on the *twelfth day of June*, in the above-mentioned fourteenth year of the reign of our said Lord the now King, &c., at &c., the aforesaid *William Mawley* delivered to *William Adams*, Esq. (the then sheriff of the said county of *Northampton*, the aforesaid writ, to be executed in due form of law; and for the execution of which writ the same sheriff then and there made and directed a certain warrant under the seal of his office to the bailiff of the said sheriff of the liberty of the hundred of *Polebrooke*, in the same county. [It then set forth the warrant.] By virtue of which warrant and writ aforesaid, the said *Thomas Bonyng* (being the bailiff of the hundred of *Polebrooke* aforesaid) afterwards, and before the return of the said writ, to wit, on the *fourteenth day of June*, in the aforesaid fourteenth year of the reign, &c., caused to be made the goods, chattels, and monies, in the within written count mentioned, and which goods, chattels, and monies,

still remain in the hands of the said *Thomas Bonyng*, neither sold nor delivered to the said *William Mawley*; and the jurors aforesaid, upon their oath aforesaid, further say, that afterwards, to wit, on the *seventeenth day of July*, on the petition of the aforesaid *Richard Baylis* (now the plaintiff), and of other creditors of the aforesaid *John Eaton*, a certain commission under the great seal of *England*, bearing date that same day and year, duly issued from the Court of *Chancery* at *Westminster*, in the county of *Middlesex*. [It then set out the commission, and an assignment by the commissioners to *Richard Baylis* the plaintiff.] And the jurors aforesaid, upon their oath aforesaid, further say, that after the making of the aforesaid indenture of assignment; and after the executing of the writ of execution aforesaid, and before the exhibition of the within-contained bill of the aforesaid *Richard Baylis*, the aforesaid *Richard Baylis* demanded of the aforesaid *Thomas Bonyng* the monies, goods, and chattels, in the within count mentioned; and that the aforesaid *Thomas Bonyng* refused, upon his request, to deliver those monies, goods, and chattels to the aforesaid *Richard Baylis*. But whether, upon all the matters aforesaid, by the jurors aforesaid, in form aforesaid, found, the monies, goods, and chattels aforesaid were well taken by the aforesaid *Thomas Bonyng*, by virtue of the aforesaid writ of execution, the

in the seizure; and it is expressly found, that the goods still remained in the bailiff's hands, not sold or delivered over to the execution-creditor; and yet *Bailey v. Bunning* has been mentioned by *Levinz* as an authority to shew that the officer shall not be charged, where perhaps the party shall; so inaccurate are the reports of that day respecting this case, and so conclusive, to my mind, that no reliance can be placed on *Bailey v. Bunning* as establishing any point at all.

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Letchmere v. Thorowgood (a) has been cited; but, if possible, it is worse reported than *Bailey v. Bunning*. The only point there was, that a man shall not be made trespasser by relation; a point confirmed in *Smith v. Milles* (b). The decision in the action of trover afterwards brought in *Letchmere v. Toplady* is plainly bad law. *Cole v. Davis* (c) is but a *Nisi Prius* decision.

Take this case, then, upon legal principles, independent of all authority. The bankrupt acts say that the commis-

jurors aforesaid are altogether ignorant; and thereof they pray the advice and consideration of the Court of our Lord the King now here; and if, upon all the matters aforesaid, by the jurors aforesaid, in form aforesaid, found, it shall seem to the Court here that the monies, goods, and chattels, were not rightly taken by the said *Thomas Bonyng*, by virtue of the writ of execution, then the jurors aforesaid say, upon their oath aforesaid, that the said *Thomas Bonyng* is guilty of the premises within laid to his charge; and in that case they assess the damages of the said *Richard Baylis*, by reason of the within-mentioned premises, besides his costs and charges by him about his suit in this

behalf expended, at 160l.; and for those costs and charges, at 53s. 4d.; and if, upon all the matters aforesaid, by the jurors aforesaid, in form aforesaid, found, it shall seem to the Court of our Lord the King now here, that the monies, goods, and chattels aforesaid were rightly taken by the aforesaid *Thomas Bonyng*, by virtue of the aforesaid writ of execution, then the jurors aforesaid say, upon their oath, that the said *Thomas Bonyng* is not guilty of the premises within laid to his charge, as he the same *Thomas Bonyng* has within for himself in pleading alleged.

(a) 3 Mod. 236.

(b) 1 T. R. 475.

(c) Lord Raym. 724.

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sioners shall deal with all the personal property of the bankrupt, of which no execution is served and executed at the time he becomes bankrupt. How deal with it? By assigning it to the assignees. In order to effectuate this intention of the legislature, it was absolutely necessary to hold that the property was in the assignees by relation from the time of the act of bankruptcy; otherwise, there would have been no mode of recovering the personal property which had been disposed of between the act of bankruptcy and the assignment. This relation is created by the statutes of bankrupt in effect, as much as if it had been expressly enacted, and manifestly binds all persons except the king, who is not named in these statutes. Now, the action of trover, which is the form of the present action, is founded on property; and, as the assignees have the property by relation, it follows that they can maintain this action against any person who has converted the goods in the interval between the act of bankruptcy and the action, subject always to the limitation of two months, introduced by stat. 49 Geo. 3, c. 121, s. 2. All the cases, from the time of the bankrupt acts of *Elizabeth* and *James* the First, shew this; and, indeed, it is on this principle only that the Court of *Exchequer*, in the present case, have given judgment against the execution-creditor and the bailiff *Ingham*. The action of trespass is very different; it is founded not on property, but on possession; and, where there is no actual possession, but right of property is said to draw to it possession, that is only where the plaintiff has a right of possession at the time of the trespass. Here he had no such right, except by relation, and the cases establish that a man shall not be made a trespasser by relation. There is reason in such a rule; for, in trespass, the damages are unlimited; in trover they are limited to the value of the property.

It being, therefore, clear, that the plaintiffs had, by relation, such a property as would maintain trover against all

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persons but the king, the question in this case, as it seems to me, is reduced to this, whether the character of the sheriff affords a defence to the action. The bankrupt acts contain no clause protecting the sheriff; they speak of all persons being bound who claim under the bankrupt; but it is contended that the sheriff does not claim under the bankrupt; yet it is admitted that the execution-creditor, who puts the sheriff in motion, does claim under the bankrupt, and that the vendee from the sheriff also claims under him; but it is said that the sheriff does not. I cannot assent to this doctrine at all. It is said to be hard on the sheriff; but if the law be clear, any hardship arising from it is immaterial; and it is not found practically hard, for the offices of undersheriff and of bound-bailiff are coveted, notwithstanding the action, which has prevailed many years. It is said that the sheriff is invincibly ignorant of the facts; so is the execution-creditor; yet he is not excused if he join in the execution: ignorance, therefore, alone, will not do. Again, the sheriff is often as invincibly ignorant in cases of bills of sale, whether they be fraudulent or not; yet he is obliged to run the risk: nay, more, where he knows of an act of bankruptcy, he is still obliged to seize under a *feri facias*, and formerly was obliged to sell, for *non constat* that any commission will issue; which is quite as hard as being obliged to act in ignorance. Whatever hardship he may have been under formerly, he is under very little since 49 Geo. 3, c. 121: he can always inquire whether any act of bankruptcy has been committed; and if he has reason to suspect that there has, he can apply to the Court for protection for two months, after which he is safe. But it is said that the law in other cases makes a distinction between a sheriff and a party; as, for instance, that a sheriff may justify under a writ of execution, but the party must shew not only a writ but a subsisting judgment. No doubt that is so; and why? Because the party in the cause, who is liable only in case

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he has been personally active in the seizure, or has taken the goods or their produce from the sheriff, yet having put the sheriff in motion, *i. e.* having sued out the writ, if he become liable at all, must shew a cause for suing out the writ; and it is obvious that the writ itself would shew no cause; whereas the sheriff does nothing till after the writ is put into his hands, and acts professedly in obedience to the writ. The difference in the requisites of a justification between the sheriff and the party arises, not from the character of the sheriff, but from the stage of the proceedings at which they respectively interfere.

The writ commands the sheriff to take the goods of *A.*; he takes goods which had been the property of *A.*, and are still in his possession, though, in point of law, they have ceased to be his property, if certain contingent events happen; but no other person at that time has the right of possession: the sheriff, therefore, is not liable to be sued in *trespass* by the person who, by the happening of subsequent events, turns out to have had in law the property of the goods at the time of the seizure; neither is the execution-creditor liable in *trespass*; but both the sheriff and the creditor, if he takes the proceeds, are liable in *trover* to render the value of the goods to the person whose property they turn out to be. I see neither hardship nor injustice in this, nor any thing contrary to the usual course and maxims of the law.

If, then, this were *res integra*, I should think the sheriff liable; much more do I so think, when I find the modern authorities so deciding, even if I were satisfied, which *I am not*, that the more antient authorities are the other way.

I am, therefore, of opinion, that the judgment of the Court of *Exchequer*, in this case, as regards the defendant *Jewison*, ought to be reversed.

TAUNTON, J.—Two questions have been raised on be-

half of the defendants in error in this case—the one, that the property in the goods and chattels seized remained in the bankrupts, *Bankhart & Benson*, until the assignment by the commissioners under the commission of bankrupt; that at the time of the seizure, therefore, they were their goods and chattels; that in making the seizure *Jewison*, the chief bailiff of the honor, and *Ingham*, his deputy, were acting in strict obedience to the writ of *fieri facias*, which commanded them of the goods and chattels of *Bankhart & Benson* to make the money to be levied; and, therefore, that *Jewison* (for of *Ingham* there was no question, in consequence of his having taken an indemnity from the judgment-creditor) is not liable to this action. The other question was, whether, admitting the doctrine of relation to be applicable to the judgment-creditors, it could be so with respect to *Jewison*, who was a public officer, and supposed to be entitled to peculiar protection, and not capable of being considered as a wrong-doer, when acting in obedience to his writ, and in ignorance of any act of bankruptcy committed. If either of these questions be answered in favour of the defendants in error, the judgment ought to be affirmed; but upon a full consideration of the subject, I am of opinion that both points are against them, and that the judgment of the Court below ought to be reversed.

In giving my reasons for the conclusion at which I have arrived, I do not mean to go into the cases at any length. They are so fully discussed in the very learned and elaborate judgment of the Court of *Exchequer*, and in the arguments at the bar, and the subject itself, speaking generally, is so familiar to the mind of every lawyer, that this is wholly unnecessary.

Upon the first point, I admit that the property in the goods, according to the case of *Carey v. Crisp* (a), is not

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transferred out of the bankrupt before assignment by the commissioners; but though this be so, it is most clear, and has been settled by a long series of decisions, that when an assignment is made under a good commission of bankruptcy, it relates back to the act of bankruptcy committed, and avoids all mesne acts. The law on this subject is thus stated by Lord *Hardwicke*, in the case of *Billon v. Hyde* (a)—“ By the act of bankruptcy, all the real and personal estate vested in the assignees, and the property vested in them from the time of the act committed; and that may go back to a great length of time, and it overcharges all those acts, without regard to the fairness or fraud in them: so that a sale of goods by the bankrupt after the act committed is a sale of their property; and for which they may maintain trover. So it is, as to the payment of money; and this was the intent of the act of Parliament, the statute of *Jac. 1*, being, ‘ that this shall not extend to the prejudice of any debtor of the bankrupt who paid his debt after the act committed, without knowing of it.’ This relation the assignment has, does not only overcharge acts done *in pais* and contracts entered into by such persons having committed an act of bankruptcy, but also acts on record, and legal acts done by him, such as judgments: so that if execution is taken out after the act committed upon a judgment before, that execution is undone and set aside. It is said, that this rule, founded on this act of Parliament, is contrary to the general reason of the law, which says, that fictions of law and legal relations shall not enure to the wrong of any one; which is a general rule, invented to support the right and equity of the case. But the reason of taking this case out of that rule is plainly this, and the law did intend it, on this general rule, that it is better to suffer a particular mischief than an inconvenience; and the Legislature foresaw there

(a) 1 Ves. 328.

would be a particular mischief, which they cured by that proviso, but did not extend it farther, because the inconvenience on the other hand, of suffering bankrupts to dispose of their effects by contracts or judgments, would put it in their power to defeat their just creditors of their debts; so, as it would be difficult commonly to find out, whether there was a mixture of fraud, the Legislature thought it better to lay down that general rule." Lord *Manfield*, in *Cooper* and *Another v. Chitty* (a), expresses himself in these words—"This relation, the statutes concerning bankrupts introduced to avoid frauds. They vest in the assignees all the property that the bankrupt had at the time of what I may call the crime committed, (for the old statutes consider him as a criminal), they make the sale by the commissioners good against all persons who claim by, from, or under the bankrupt after the act of bankruptcy, and against all executions not served and executed before the act of bankruptcy." It must be particularly recollected that this relation takes effect, not from the common law, but by statute; and the necessary result is, that though, at the time of the execution executed, goods seized under an execution may ostensibly have been the goods of the bankrupt, and in truth would have been and have continued to be so, notwithstanding a prior act of bankruptcy committed, if no commission was sued out thereon; yet if a good commission be taken out, and an assignment executed, whoever possesses himself thereof at any interval of time between the act of bankruptcy and the assignment, is considered as possessing himself of the property of the assignees. He, therefore, whether judgment-creditor, or sheriff, or bailiff, or any other person, who, in such a case, takes the goods apparently of *A.*, the bankrupt, has, in legal effect, taken possession of the goods of *B.*, the person

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who afterwards becomes assignee, and is liable to an action at the suit of *B.*, the subsequent assignee, for so doing, unless he be protected by some peculiar privilege.

This brings me to the second question, whether a sheriff has such a privilege; so that, under the same circumstances, ignorance of any act of bankruptcy committed being one, the judgment-creditor will be liable, and the sheriff will not. It is said that he has, because he is the king's officer, and that he is acting only in obedience to the writ which he is obliged to execute.

Now, if there be an exception to the general rule in the instance of a sheriff, it is an implied one, for there is none to be found in the statute. The words of the 6 *Geo.* 4, c. 16, s. 12, which are the same as those in 13 *Eliz.* c. 7, s. 2, are general, that the commissioners shall have full power and authority to take order and direction of all the bankrupt's lands which he shall have in his own right before he became bankrupt, and of all his money, goods, chattels, &c., and to make sale thereof, or otherwise order the same, for satisfaction and payment of the creditors. I confess, I can see no necessity for making this exception in favour of the sheriff. He is the immediate officer of the king and all his courts, to execute the writs of the common law; and, for doing this, he is entitled, on the one hand, to certain allowances and fees, and subject, on the other, to many perils and liabilities; and to these perils and liabilities, though they may, in particular instances, work great injustice, he is exposed for the public good. If we were to confine the liabilities of sheriffs to cases of personal misconduct or default in them or their officers, we should overturn the settled administration of law upon this subject, and throw every thing into confusion. Nothing can be more severe than the responsibility of sheriffs in the case of bail. If he refuses sufficient bail, he may have an action brought against him by the defen-

dant; and if he takes it, and the defendant in the suit does not appear according to the exigency of the writ, which he can only do by putting in and justifying bail above, he may be attached by the plaintiff. So he is identified with the bailiffs, and liable for all their acts, though beyond the scope of their authority and contrary to their duty, as voluntary escapes, extortion, and the like. In the one instance, without the means of knowledge, he is bound to judge of the sufficiency of persons tendering themselves as bail; and, in the other, he is driven to protect himself by a bond from sureties for the good conduct of his officers, and to rely upon such security, which may turn out to be worthless, for indemnity. So, in executing process, whether against the person or against goods, he acts at his peril, and is responsible if he makes any mistake, however innocently, with respect to the identity or the property. This has been carried so far, that in a case where he had seized goods under a *fi. fa.* against *A.*, in a house where *A.* and the plaintiff lived together as man and wife, and the plaintiff afterwards discovered, that, when she intermarried with *A.*, he had another wife living: it was held, that the plaintiff might recover the value of the goods against the sheriff, they having been her property before the marriage, it not appearing that the plaintiff knew, at the time of the execution, that *A.* had another wife living. *Glasspoole v. Young and Others* (a). All this apparent injustice has its origin in, and can be excused only by, the apprehension of the numberless frauds, oppressions, and inconveniences that would otherwise ensue.

But, in favour of the sheriff upon this occasion, the case of *Bailey v. Bunning* (b) has been cited. I admit this case, as reported in *Levin*, to be *prima facie* an authority for the sheriff, though, in *Siderfin*, the reporter subjoins a query

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(a); 9 B. & C. 696.

(b) 1 Lev. 173.

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with this remark—"For it was affirmed that the practice is, that the bailiff shall be found guilty if the party was then a bankrupt." But it may be observed, that this appears to have been the first case decided upon this point of relation after the statutes 13 *Eliz.*, 1 *Jac.* 1, and 21 *Jac.* 1, and was decided at the time when the bankrupt law was not moulded, partly by decisions of Courts of justice and partly by subsequent statutes, into that more perfect system which it afterwards attained. It is still more material to observe, that, on referring to the original record, it appears that the special verdict does not expressly find any conversion by the defendant *Bonynge*. The action was trover against the judgment-creditor *Mawley*, and the officer *Bonynge*. The former was found not guilty, and, with respect to the latter, the jury found, that, by virtue of the warrant and writ he caused to be made the goods, chattels, and monies in the count mentioned, and which goods, chattels, and monies still remain in the hands of the said *Thomas Bonynge*, neither sold nor delivered to the said *William Mawley*. They afterwards further said, that *Richard Baylis* (the plaintiff) demanded of the said *Thomas Bonynge* the monies, goods, and chattels in the count mentioned, and that the said *Thomas Bonynge* refused, upon his request, to deliver them to *Baylis*. But whether, upon all the matters found, the monies, goods, and chattels aforesaid were well taken by *Bonynge* by virtue of the writ of execution, the jurors are ignorant, and pray the advice and consideration of the Court; and if it shall seem to the Court they were not rightly taken, then *Thomas Bonynge* is guilty of the premises laid to his charge; but if rightly taken, then not guilty. A demand and refusal, therefore, are found, but no sale or express conversion; and the question referred to the Court is merely as to the taking. This, I think, considerably impugns the authority of the case, inasmuch as the conversion, which is

the gist of the action, is not found; and from the contradictory accounts of the several reports of this case, it is difficult to ascertain the ground of the decision.

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The case of *Turner v. Felgate* (a), was also cited as illustrating by the reporter's note, and not by the decision itself, the difference between charging the officer and charging the party. It was there held, though *Twisden* was not satisfied, that the party who levied upon a judgment that was afterwards vacated, was a trespasser by relation. This was the only point decided; and the reporter subjoins a note of observation, that the action was brought against the party and not against the sheriff, who had the king's writ for his guarantee, and refers to *Bailey and Bunning's* case. This case, therefore, and that also of *Phillips v. Thompson* (b), in which the ground of the decision in *Bailey v. Bunning* is simply stated, are not additional authorities, because this very point was not adjudged in either. Of *Letchmere v. Thorogood* (c), it is sufficient to say, that the form of action there was trespass, and not trover; and the only point decided was, that a man shall not be made a trespasser by relation; and it is a very different thing to make a sheriff answerable in trover, where the value of the property only is the usual measure of damages; and in trespass, where circumstances of aggravation may swell their amount. It by no means follows of necessity that the Court would have holden that trover would not lie, because they held that trespass did not; though it is probable that, at that day, founding themselves upon *Bailey v. Bunning*, they might have so held; and it is not immaterial to observe, that the distinction in this respect between trespass and trover is particularly pointed out by Lord Mansfield in the case of *Cooper v. Chitty*, and is the particular ground of decision in the case of *Smith and Another, Assignees, v. Milles* (d).

(a) 1 Lev. 95.

(c) 3 Mod. 236; 1 Show. 12;

(b) 3 Lev. 193.

Comb. 123.

(d) 1 T. R. 475.

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As to the case of *Cole v. Davis* and Others (a), Lord *Mansfield*, in *Cooper v. Chitty* (b), says:—"These notes were taken when Lord *Raymond* was young, as short hints for his own use; but they are too incorrect and inaccurate to be relied on as authorities." And the resolution relied on in the present case is considered by him not to have been warranted by the case then in judgment, but to have been a mere *obiter* reference to the determination in *Bailey v. Bunning*.

In *Aldridge v. Ireland*, cited 1st *Taunton* (c), it was not necessary to decide this question, although it arose, the sheriff having been indemnified; and the same observation, that there was no decision on this point, may be applied to *Coppendale v. Bridgen* and Another (d); although, if one were inclined critically to examine the language used by part of the Court, Mr. Justice *Foster*, if the sheriff there had returned *nulla bona*, on the day of the return of the writ, that would not have been a false return, though the act of bankruptcy on that day was incomplete; because the relation is made to be to the time of the first arrest, by the express words of the statute. But I by no means rely upon this, inasmuch as the other Judges had doubts upon the point.

The case, then, of *Bailey v. Bunning*, such as it is in *Levinx*, is, in effect, the only one solitary decision purporting expressly to be in favour of the officer.

I agree that, according to the report of the case of *Cooper v. Chitty*, in *Burrow*, that case is no authority for the present. Lord *Mansfield* there is reported to have made two points:—the first, whether or not there was sufficient property in the plaintiffs, as assignees, to enable them to maintain the action; and, secondly, whether the defendants had been guilty of a wrongful conversion; and the decision turned upon this, that the sale having been *after the commission and assignment*, which were both no-

(a) 1 Ld. Raym. 724. (b) 1 Burr. 36. (c) 273. (d) 2 Burr. 814.

torious transactions, the conversion was wrongful. It is true, that, in *Blackstone's* report of the case (a), Lord *Mansfield* is reported to have said—"But had the sale been immediately after the seizure, still the sheriff would have been liable." Of these reports, that of *Burrow* is probably the more correct, as it is certainly the most elaborate, and perhaps received the correction of Lord *Mansfield* himself.

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But, notwithstanding *Cooper v. Chitty* be no direct authority against the sheriff in a case where the seizure and sale are both *before* the commission or notice of it; yet it appears to me to be pretty clear, that, soon after that case, an opinion grew up in the profession that the sheriff was equally answerable in both cases, upon the ground that, from the act of bankruptcy, the property, by relation, vests in the assignees; and that any sale or disposition of it afterwards, without their privity, must be a wrongful conversion, by whomsoever made. The observations which fell from the Court in *Hitchin* and *Others v. Campbell* (b), determined in *Trinity* Term, 12 *Geo. 3*, only sixteen years after the decision of *Cooper v. Chitty*, afford strong proof of this; and in *Lazarus v. Waithman* (c), which was trover against the sheriff, where the seizure and sale were both before the issuing of the commission, *Burrough*, J., who spoke from very long experience, said, the point was settled long before he knew *Westminster-hall*. I consider this case and *Potter v. Starkie* (d), and *Wyatt v. Blades* (e), which two last cases were *Nisi Prius* decisions, and *Lee v. Lopes* (f), and *Price v. Helyar* (g), *Carlisle v. Garland* (h), which was on special verdict, and *Dillon v. Langley* (i), as constituting one continued series of

(a) 1 *Blac.* 69.

(b) 3 *Wils.* 304; 2 *Black.* 827.

(c) 5 *B. Moore*, 313.

(d) *Selw. N. P.* 1431; cited in
4 *M. & S.* 260.

(e) 3 *Camp.* 396.

(f) 15 *East*, 239.

(g) 4 *Bing.* 597; 1 *M. & P.* 541.

(h) 7 *Bing.* 298; 5 *M. & P.* 102.

(i) 2 *B. & Ad.* 131.

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decisions, establishing the liability of the sheriff. These will be found to embrace a very considerable period of time, and to have been established in succession by all the common law Courts in *Westminster-hall*; and the common practice, I believe, has been in uniform concurrence therewith. I cannot think, that, against this accumulation of authority, the single case of *Bailey v. Bunning*, as reported in 1 *Levinz*, ought to prevail; and that, however strong particular notions may be as to what the law ought to be, we must be governed by what it has been during the whole time of living memory.

I am of opinion, therefore, that the judgment of the Court below, as to *Jewison*, should be reversed.

BOSANQUET, J.—The question in this case depends upon the effect which is to be given to a statutory provision; by which the property of a bankrupt, which he had at the time of his bankruptcy, is subjected to the operation of a commission against him. The terms of the 6 *Geo. 4*, by which the bankrupt law is now regulated, do not materially differ from those of the statutes which immediately preceded it; and, being *in pari materia* with these, must receive a similar construction, there being no reason to suppose that any alteration regarding the point under consideration was intended to be made by the legislature. It is not to be disputed, with respect to persons in general, that, after an assignment by the commissioners, all the property of the bankrupt is liable to be treated and dealt with, not merely as actually being, but as having been, from the time of the act of bankruptcy, the property of the assignees; and that persons who possess themselves of such property, or dispose of such property to others, are liable to be sued for it as a tortious conversion in an action of trover. This liability to answer in an action of tort to the assignees does not depend upon any actual or presumed knowledge, on the part of the defendant, of the existence of an act of bankruptcy. The act of bankrupt-

cy subjects the property of a trader to the right of his assignees, in the event of a commission: and when the assignment has been executed, the title of the assignees is completed, by relation, from the date of the act of bankruptcy. The effect of this relation may sometimes produce hardship to individuals who may have purchased or disposed of property with perfect honesty and good faith. But the necessity for adopting a retrospective measure for the prevention of fraud has been thought sufficiently to counterbalance the evil of such occasional hardship. Even those persons who purchase goods sold by the sheriff under an execution against a trader are liable to be sued in trover for the value of the goods, by the assignees claiming under a commission subsequently issued, if an act of bankruptcy appears to have been committed by the trader before the sale. A limit, however, has been set to this retrospective effect of the bankrupt law, by provisions introduced into the latter statutes, by which parties who act *bonâ fide*, and without notice of an act of bankruptcy, are protected, unless a commission shall have issued within a certain time. Such being the general effect of the bankrupt law, the point now to be considered is, whether any exception to it is to be allowed in favour of the sheriff, who sells under the process of the law. No words, importing any express exception, are to be found in any of the statutes; the exception, therefore, if established, must be established by implication. The mere absence of notice is not a sufficient ground on which an exception in favour of the sheriff can be founded. For, in cases where a change of property has taken place without fraud, the sheriff, if he seizes and sells the goods of the purchaser, under an execution against the seller, will be liable in an action, though he may neither know, nor have reason to suspect the change. In the case of bankruptcy, the act of bankruptcy, whether notorious or secret, is a fact which, coupled with the existence of a debt to a certain amount, ren-

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ders the property of a trader liable to the operation of a commission. The right of the trader to his own property is a defeasible right. Till the commission issues, the property remains in the trader; but he holds it, from the time of the act of bankruptcy, liable to be defeated by the proceedings under a commission, and subject to the rights, which, in the event of a commission, the assignees may acquire to it. In the mean time, this possibility of a right accruing to assignees under a commission, affords no legal answer to the sheriff for not executing the writ directed to him; but if the sheriff has reason to apprehend a commission, he may ask for an indemnity; and in case a satisfactory one be not given, he may apply to the Court for time to return the writ, till it can be ascertained whether a commission is intended to be issued. Some risk indeed will be incurred by the sheriff; and, if he is necessarily to be protected from all risk, an exception in his favour must be implied by law. But it is to be recollected that the office of sheriff is in its nature an office of risk. It is not for us now to consider whether the policy of the law, which has made it so, is, or is not, founded on wise principles. But so the law has made it, and so it must be treated in Courts of justice. The sheriff is bound by statute to permit a defendant who is arrested to go at large upon bail; yet, if the bail, apparently or even actually responsible at the time, become insolvent before the return of the writ, the sheriff must render the defendant, or pay the debt. This is a hardship upon the sheriff, imposed by the operation of the statute of *Henry the Sixth*. No difficulty, however, is found in obtaining persons willing to incur this responsibility, the office being an office of profit as well as of risk. If, therefore, the liability of the sheriff in the present case were now to be considered for the first time, I think that his title to an exemption from the general operation of the bankrupt law, would be far from clear. To me, however, it appears, that the question ought not, at the present day, to be considered as open

to discussion. The interpretation of the statute law, as well as of the common law, is to be sought for in the doctrines promulgated and acted upon in Courts of justice. It may be admitted, indeed, that the express provisions of a statute cannot be overturned by the authority of a Court; but, upon the propriety of admitting an implied exception, in the absence of express words, the authority of the Court has the same weight as upon questions of common law; their decisions give the rule by which the profession is guided in advising parties upon their respective rights: and to question their correctness, after they have been recognised and acted upon for a long series of years, is not only to introduce uncertainty upon the point under immediate consideration, but to encourage resistance to established rules, by holding out to ingenious persons a prospect of overturning them, upon refined and subtle distinctions. If the judgment in *Cooper v. Chitty* be considered with reference to the facts of that case only, it will not amount to an authority upon the point now under discussion since it appears that the sale by the sheriff took place not only after the date of the commission, but after the assignment. But the authority of considered judgments is not to be confined to the point actually adjudged. The reasoning of Lord *Mansfield*, in delivering the judgment of the Court, appears to take a wider range than the particular facts of the case required. He begins by saying, that the bare defining the action of trover, and the grounds upon which the plaintiff is entitled to recover in it, will go a great way towards the understanding, and consequently towards the solution, of the question in that particular case. In form, he says, it is a fiction; in substance, a remedy to recover the value of personal chattels, converted by another to his own use; that it lies in many cases where the defendant has got the possession lawfully; that two things are necessary to be proved, property in the plaintiff, and a wrongful conversion by the defendant. After laying it down, that dispositions by process of law are

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upon the same footing with dispositions by the party, and that, to be vested, they must be completed before the act of bankruptcy, he says—"Therefore, as to the first point, it is most clear that the property was in the plaintiff, as and from the 4th of *December*, when the act of bankruptcy was committed. *Secondly*—The only question is, whether the defendant was guilty of a wrongful conversion. That the conversion itself was wrongful is manifest; the sheriff had no authority to sell the goods of the plaintiff, but of *Johns* only." Here the right to the property disposed of is made the test of the wrongful conversion. His Lordship then proceeds to consider whether the defendant was excusable, though the act of conversion was wrongful. As to which he says—"Though the statutes rescind contracts and executions not completed before an act of bankruptcy, they do not make men trespassers or criminal by relation." "But the injury complained of (that is, in the action of trover) is the wrongful conversion." "The sheriff acts at his peril, and is answerable for all mistakes." "None of the cases authorize the sheriff to sell the goods of a third person." Here the distinction between trespass and trover appears to be distinctly taken. The injury complained of in trespass is the unlawful force; in trover, the wrongful conversion of property. The mere act of force is excused if committed before an assignment in fact; but if a conversion takes place, the person to whom the law ascribes the property is entitled to a compensation for his loss, from the person, whoever he may be, that has converted his property. It had been determined, in the case of *Bailey v. Bunning* (a), that a sheriff, who had taken goods in execution after an act of bankruptcy, was not liable to the assignees in an action of trover. The dates of, and the special finding of the jury, as they all appear upon the special verdict, have been already stated. It is very material to observe, that in this case there was no sale; no-

(a) 16 Car. 2, reported 1 Lev. 173; 1 Sid. 272; and 2 Keble, 32.

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thing was done with respect to the goods beyond the first taking possession under the writ by the officer, in whose hands they still remained when the action was brought; and the sole question referred to the Court by the jury was, whether this taking was lawful. Unless this taking amounted to a conversion, the defendant was entitled to a verdict for the demand and refusal stated in the special verdict, though evidence of a conversion could not be taken to amount to an actual conversion; a point which had been settled long before the case in question, having been laid down as clear in 10 *Coke's Rep.* 56, 57, the case of the Chancellor of Oxford. According to the report in *Leviar, Wyndham* said, that notwithstanding the suing of the writ, the goods are subject to the disposal of the commissioners, but he, *Twysden* and *Kelynge*, all agreed, that the issue was found for the defendant; for the taking by him was lawful, by virtue of the writ. *Siderfin* says, the Court delivered their opinion, that the goods were liable from the time of the teste of the *feri facias*, and this shall be said to be *emanatio brevis*, although it was in fact at another time. And as to the other point, they were clearly of opinion, that the bailiff was not liable in trover; for that the sheriff (as the case is found) took the goods lawfully. According to *Keble, Kelynge*, C. J., said, the special conclusion being on the taking, the officer is not punishable. The case of *Bailey v. Bunning*, therefore, is not an authority for the sheriff where there has been an actual sale, and so Lord *Mansfield* appears clearly to have thought. And with respect even to the original taking, the case of *Bailey v. Bunning* is distinguishable from executions of a later date. For though the writ of *fi. fa.* had been delivered to the sheriff after an act of bankruptcy, it was tested before, and having been issued in a case which occurred before the statute 29 *Car. 2*, c. 3, it did then bind the goods from the teste; upon which point much reliance was placed. Accordingly, Lord *Mansfield* observes, that

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“in the case of *Bailey v. Bunning*, the goods were clearly bound by the teste;” and then adds, “the question referred by the special verdict was upon the *taking*, viz., whether the party was guilty in the *taking*, and the Court excuse the bailiff for his *innocent executing* of the writ.” The act of taking seems to have been treated as an act of excusable trespass, either on account of the teste, or the character of the officer; and, independently of the taking, there was no conversion. It is remarkable, that *Siderfin*, after stating the argument for the bailiff, that he ought not to be found guilty, because he had only performed his duty, and had not converted the goods to his own use, adds—“*Quære*, for it was affirmed that the practice is, that the bailiff shall be found guilty, if the party was then a bankrupt.” It is said in Lord *Raymond's Reports*, 7 24, to have been ruled by Lord C. J. *Holt*, at *Nisi Prius* (a), that if, after a bankruptcy, the sheriff, upon a writ of *fi. fa.* against A., seizes the goods, and sells them, and a commission of bankruptcy is granted, and the goods assigned by the commissioners, the assignee of the commission may maintain trover against the vendee of the goods, but no action will lie against the sheriff, because he obeyed the writ.” The latter part of this proposition is the very point now contended for, to which it appears, from his remarks on Lord *Raymond's* notes, that Lord *Mansfield* did not assent. He says, “the notes were taken when Lord *Raymond* was young, as short notes for his own use, and are too incorrect and inaccurate to be relied on as authorities; that it might not be at all material to attend to the distinction between trespass and trover; that the passage in question was a loose note of what was said *obiter*, and manifestly refers to the case of *Bailey v. Bunning*; but is no authority in the present case.” It must be admitted, however, that Lord *Mansfield*, in seve-

(a) 10 Will. 3.

nal parts of his judgment, notices and avails himself of the sale in *Cooper v. Chitty* being subsequent to the commission and assignment. Thus, in commenting upon *Cole v. Davies*, he says, "besides, the case there put is of a sale by the sheriff before the commission, and the conversion might be as excusable as the taking, because he obeyed the writ; whereas, here, the goods were not sold till after both commission and assignment." Again, "the taking in *Cooper v. Chitty* was innocent, and, in that sense, lawful; but as a ground to support a conversion by sale after a commission publicly taken out and an actual assignment made, it was not lawful;" and at the conclusion, "the gist of this action is the wrongful conversion by the sale, and false return long after the commission and assignment." A question, therefore, might fairly be raised, whether the proposition ascribed to Lord *Holt* was intended to be denied by Lord *Mansfield*, or only to be distinguished from the case in judgment. It is scarcely possible that such a point should be long suffered to remain in doubt, since it must have been of frequent occurrence; and if the general reasoning of Lord *Mansfield*, and his particular observations respecting Lord *Raymond's* note have, from the year 1756, been treated in practice and in judgment, as contradictory to the point therein stated, the point ought to be considered as overruled. Two passages, apparently inconsistent with each other, have been cited on the authority of Sir *W. Blackstone*. In his report of *Cooper v. Chitty*, he states Lord *Mansfield* to have said, "but, had the sale been immediately after the seizure, still the sheriff would have been liable." And in his report of *Timbrel v. Mills*, that "the whole Court declared that it was allowed in that case (*Cooper v. Chitty*), that if the sheriff levies the money and pays it to the plaintiff before any commission issued, and without notice of the act of bankruptcy, he will at all events be safe." It is not likely that both these passages should have been uttered by Lord *Mansfield* upon the


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same occasion; and as no notice is taken of either of them in the report of Sir *James Burrow*, or in that of Lord *Kennyon*, little reliance can be placed upon them. No question appears to have been raised respecting the effect of the judgment in *Cooper v. Chitty* till the year 1807, in the case of *Potter v. Starkie*; but, in the meantime we find the principle supposed to be established, stated in practical books, and assumed in Courts of justice. In the edition of *Cook's Bankrupt Law*, published many years before the case of *Potter v. Starkie*, it is said—"The sheriff, who executes a *fi. fa.* upon the bankrupt's goods after an act of bankruptcy committed, and before the issuing of a commission, is not a trespasser; but the assignees may maintain trover against him." In *Gwillim's* edition of *Bacon's Abridgment*, published 1798, tit. *Bankrupt*, it is said, "it seemeth to have been formerly much doubted whether the assignees could maintain any action against an officer who had taken the goods of a bankrupt in execution after an act of bankruptcy and before the issuing a commission. But it is now settled, that the assignees may in such case bring trover against him, though the relation shall not operate to make him a trespasser." The distinction with respect to the liability of the sheriff in trover, though exempt from an action of trespass, had been recognised in 1786, in *Smith v. Milles*, as established by *Cooper v. Chitty*. In *Hitchin v. Campbell* (a), only 16 years after *Cooper v. Chitty*, which was an action of *indebitatus assumpsit* against an execution-creditor for the amount of debt levied after the act of bankruptcy, but before the commission, Lord C. J. *De Grey*, in delivering the opinion of the Judges, (of whom Sir *W. Blackstone*, who reports the case, was one) says, "that the legal effect of an act of bankruptcy committed by a trader, is to put it in the power of the commissioners, by relation, to divest the property of the bankrupt from that time in case a commission is afterwards issued. This relation takes place in every instance

(a) 2 Black. 829, T. T. 12 Geo. 3.

but those excepted by the statutes 1 *Jac.* 1, 21 *Jac.* 1, and 19 *Geo.* 2. Executions are not among those excepted cases, but are expressly declared void by the statute 21 *Jac.* 1. Yet, notwithstanding this transfer of the property by relation, the sheriff is certainly no trespasser by taking the goods in execution after the act of bankruptcy and before the commission issued. So ruled in *Letchmere v. Thorouggood* (a), and in *Cooper v. Chitty* (b): but, by selling, the sheriff converts the goods; and then trover is maintainable against the sheriff, or his vendee, or the plaintiff in the original action." A former action had been brought in trover against the sheriff and the defendant, in which there was a verdict and judgment for the defendant; as to which action the Chief Justice observed—"As there was clearly a conversion before the action of trover, the only question could be on the property;" thereby intimating, that, if the goods belonged to the bankrupt, there could be no defence. And, according to the report of the same case in 3 *Wils.* 308, the Court say, "That the action brought in trover against the sheriff of *Surrey* and the defendant to recover the value taken in execution well lay." In the year 1792, *Grose, J.*, in the case of *Farr v. Newman* (c), after adverting to the difficulty on the part of the sheriff of distinguishing between the goods of an executor and the goods of a testator, says, "If this would be a sufficient answer in the mouth of the sheriff, what are we to say to cases of a much severer line of justice; cases where a sheriff is considered as a *tortfeasor by relation*; cases of bankruptcy?" In the case of *Menham v. Edmonson* (d), the act of bankruptcy took place in *December*, 1796, the execution the 30th of *March*, 1797, and the commission issued in the *June* following. The execution-creditor having accompanied the sheriff's officer at the time of the execution, he was sued by the

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(a) 1 *Comb.* 123; 1 *Show.* 12.

(b) *Burr.* 20.

(c) 4 *T. R.* 633.

(d) 1 *B. & P.* 367.

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assignee in trover; and it being objected that the action should have been brought against the sheriff in whose hands the money remained, and it was not contended that the action might not have been maintained against him; Chief Justice *Eyre*, after stating that he had some doubt at first whether the action should not have been brought for the money, as the execution had been regularly made under the authority of the law, and the goods regularly sold, observed, "There is a fact, however, in this case, which decides the point, viz. that the defendant was in company with the sheriff's officer at the time of the execution. By the case cited, *Rush v. Baker* (a), it appears that trover may be maintained against the party himself, if he give bond to the sheriff, because it is equal to intermeddling; actual intermeddling, therefore, must be equal to giving a bond." Here the liability of the sheriff himself seems to have been assumed; and the participation of the defendant in his act is stated as the ground of his liability. In the year 1807, the point now in question was distinctly made before Mr. Baron Wood, in *Potter v. Starkie*; and that Judge, whose practical experience, as well as learning, are well known, held the sheriff liable, in which he was confirmed by the Court of *Exchequer*. Eight years after this, the case of *Wyatt v. Blades* (b) occurred before Lord *Ellenborough*, in which the act of bankruptcy, having taken place on the 8th of *December*, the goods were seized and carried to a broker on the 8th of *February*, and the commission issued on the 12th of the same month; and Lord *Ellenborough* held, in trover against the sheriff, that the removal was a sufficient conversion to support the action, though the goods were never sold, but remained at the broker's in consequence of a notice not to sell: and, though no demand of the goods had been made, no objection was made to the liability of the sheriff to answer for the conversion. In eight years

(a) 2 Stra. 996.

(b) 3 Camp. 396.

more, in the year 1821, the point was again raised, in *Laxarus v. Waithman* (a), in the time of Lord Chief Justice *Dallas*, when the Court of *Common Pleas*, after an argument in which *Bailey v. Bunning* and other old cases were cited, decided against the sheriff—Mr. Justice *Burrough* saying, that the point was settled long before he knew *Westminster-hall*. Again, in 1828, *Price v. Helyar* (b), in the time of Lord Chief Justice *Best*, the same Court came to a similar determination. And the judgment of that Court in *Carlisle v. Garland* (c), in the year 1831, in the time of the present Lord Chief Justice, was conformable to the former decisions. Finally, in the same year, 1831, the Court of *King's Bench*, in *Dillon v. Langley* (d), also decided in the same manner against the sheriff. Upon that occasion, the noble and learned Lord, whose loss we have so recently had to deplore (Lord *Tenterden*), expressed the opinion of the Court in the terms which I desire to adopt, and with which I shall now conclude. “He (the sheriff) must obey the writ, but he is also required to know whose goods he takes. I think, in this case, we ought to say that we consider ourselves bound by the many decisions which have taken place, establishing the liability of the sheriff.” I am therefore of opinion, that the judgment of the Court of *Exchequer* ought to be reversed.

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GASELEE, J.—Upon the best consideration I have been able to give to this case, I am of opinion that the judgment of the Court of *Exchequer* ought to be affirmed; and, although I am sorry to have the misfortune of differing from those of my learned brethren who have preceded me, and also of those who are to succeed me upon this occasion, it is a matter of great consolation to me, that I am supported by the unanimous opinion of the Court of *Exchequer*. The reasons upon which that

(a) 5 B. Moore, 313.

(b) 4 Bing. 597; 1 M. & P. 541.

(c) 7 Bing. 298; 5 M. & P. 102.

(d) 2 B. & Adol. 131.

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judgment is founded are so fully, and to me so satisfactorily, stated by the Lord Chief Baron in the reports of the case in *2 Crompton & Jervis*, p. 20, and in *1 Tyrwhitt*, p. 17, that I should consider myself guilty of an unnecessary waste of time, were I to repeat them from the reports; and I should run a considerable risk of weakening their impression, were I to attempt to state them in any other terms.

There is certainly great weight in the argument, that the decisions in *Cooper v. Chitty*, and many subsequent cases, are contradictory to that of the Court of *Exchequer*; and if they had corresponded with the older cases, so that there had been a constant course of decisions in the same way, I should have very much hesitated before I should have ventured to break in upon them; and it is to that circumstance that I attribute my having concurred in the judgment given by the Court of *Common Pleas* in the case of *Price v. Helyar*, having always considered that, if the case were a new one, the sheriff was undoubtedly entitled to protection. Independently, however, of the circumstance, that in the case of *Cooper v. Chitty*, and many of the subsequent ones, the acts of the sheriff, after he had notice of the bankruptcy, were sufficient to support the decision of those cases, it appears to me that the earlier cases are authorities in favour of the sheriff; and, therefore, that, in affirming the judgment of the Court of *Exchequer* on this occasion, we should not be overturning the constant course of the authorities upon the subject, but restoring the law as it was laid down and acted upon in the reign of *Charles 2*, and from thence downwards to the time of the decision in the case of *Cooper v. Chitty*.

Upon considering the several reports of the case of *Bailey v. Bunning*, it is not quite clear that the allegation in the judgment of the Court of *Exchequer*—that in deciding the case of *Bailey v. Bunning*, the Court, by disallowing the objection that the goods were to be con-

sidered as bound by the teste of the writ of execution, which was before the act of bankruptcy, allowed the other objection, viz. that the taking was lawful in respect of the character of the person by whom it was made—is quite accurate; for, although the latter was clearly one of the grounds of the decision, it is not so clear that it was the only one. The report in *Levinx* concludes thus: “And afterwards, in *Easter Term*, 18 *Car.* 2, judgment was given for the defendant; he being an officer obliged to execute the writ, who could not be aware of any acts of bankruptcy, or know that any of them would be acted upon.” And the report in *Siderfin* states the Court, as to the other point, viz. the character of the sheriff, were clear that the bailiff is not guilty of trover; for that the sheriff took the goods lawfully.

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During the argument of this case in the Court of Error, a doubt was thrown out whether the case of *Bailey v. Bunning* was an action of trover; and it was suggested, that it might be an action of trespass, and so reconcile all the cases. The original roll has, therefore, been inspected, and it thereby clearly appears that the form of action was trover. It is unnecessary for me to trouble the Court with further observations.

LITLEDALE, J.—It is admitted on all hands, that, as far as relates to the judgment-creditor, if he interferes in the sale or receives the produce after the sale, and also the vendee of the sheriff or other officer, the goods of the bankrupt are upon the assignment to the assignees vested in them by relation to the act of bankruptcy, so as to avoid all mesne acts and dispositions; and that, both upon the words of the various acts of parliament and the uniform construction that has been put upon those acts, and the policy of the bankrupt laws. And, therefore, I do not think it necessary to advert to any authorities as to the ground or effect of relations, either at common law or by any acts of parliament.

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The words of the act of parliament relating to bankruptcy are general, and make no exceptions as to the persons to be bound; only, indeed, that, as the king is not named in them, they do not affect the crown till there is an actual assignment of the property. But it is contended on the behalf of the defendant, that he is to be exempted from liability for seizing and selling, if he has no notice of an act of bankruptcy; and he contends this upon two grounds:—1st, That the older statutes of 33 & 34 *Hen.* 8, c. 4; 13 *Eliz.* c. 7; 1 *Jac.* 1, c. 15; 19 *Jac.* 1, c. 19; and 5 *Geo.* 2, c. 30, do not extend to the sheriff at all; and that the last statute of 6 *Geo.* 4, does not increase the liability of the sheriff.

The statute of *Hen.* 8 says, the sale by the commissioners shall be good and effectual against the bankrupts, their heirs and executors, as though the sale had been made by the bankrupt at his own free will and liberty.

The 13 *Eliz.* c. 7, s. 2, says, the sale by the commissioners shall be good and effectual (after an enumeration of various descriptions of persons), “against all other persons claiming by, from, or under the bankrupt, by any act had, made, or done, after he shall become a bankrupt.”

The other acts of the 1 *Jac.* 1, 19 *Jac.* 1, and 5 *Geo.* 2, as to the sale or assignment by the commissioners, all refer to the stat. of *Eliz.*; and no fresh powers are given to the commissioners, except that the 26th section of the 5 *Geo.* 2 directs the commissioners to assign to assignees for the general benefit of creditors who prove their debts. But I think that the words of the statute of *Elizabeth* are sufficient to bind the sheriff; for though he does not claim as to any beneficial interest from the bankrupt, yet he claims to sell for the purpose of paying over the proceeds to the creditors of the bankrupt; and the person to whom he sells certainly claims under the bankrupt; and it would be somewhat extraordinary if the sheriff, who sells under such circumstances, was to be excepted out of the operation of the statute.

I may observe, that I am not aware that this point has ever been raised before; which, if there had been any ground for it, would surely have been done, considering the great variety of cases in which this subject has been agitated for the last one hundred and seventy years.

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The statute of the 6th *Geo.* 4, c. 16, is differently expressed from the former acts. In the 12th section, it says, the commissioners are to assign in manner after directed; and then the manner is directed in the 63rd section, which contains no such words as are contended to be a limitation of the persons bound.

But I do not consider whether this enlarges the power of the commissioners or not, because I think the former acts extend to sheriffs and other similar public officers.

But it is said, the law will make an implied exception in favour of the sheriff, or other persons having the execution of process, because he is bound to obey the king's writ; and it would be very hard to make him liable to an action when he acts according to the best of his judgment, and has no means of ascertaining whether the debtor has, or has not, committed an act of bankruptcy.

With regard to his being a public officer, and that he is bound to obey the king's writ, there is no doubt but he is; and in the execution of that duty he ought to be protected. But the question is, does he act in obedience to the king's writ? That commands him to take the goods of *A.*; but how can they be said to be the goods of *A.*, when *A.* himself has lost his power of continuing his property in them, and when the judgment-creditor has no right to have them as the goods of *A.*, and when the person to whom the sheriff will sell has no such right? And the result, therefore, is, that instead of seizing the goods of *A.*, he seizes the goods which, by relation, have become the goods of the assignees.

But it may be said, they are the goods of *A.*, that he has

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acquired them, that he is in possession, treats them as his own, and no other person has yet acquired a right to them. But, by the act of bankruptcy, there is a sort of stamp or mark fixed upon them, which, though invisible at first, afterwards is brought into light by the commission, and attaches upon them so as to destroy all property in the bankrupt; which destruction of property, though not apparent at the time of the levy, afterwards, when the commission and assignment take place, operates in the same way as if the whole had been known at first. He takes upon himself to sell goods which the judgment-creditor has no right to have sold, and which the person who buys from the sheriff has no right to buy. How can this be acting in obedience to the king's writ?

As to the hardship upon the sheriff: the general policy of the bankrupt laws makes many things apparently hard. It is very hard, that if a man, who owes a trader money, pays it to him *bond fide* in the regular course of business, without any suspicion of an act of bankruptcy; or, if a bankrupt owes money which he pays to a creditor in the ordinary course of business, he having no suspicion that an act of bankruptcy has been committed; or, if a trader sells his estate after having committed a secret act of bankruptcy—that all these transactions should be rendered invalid by the general operation of the bankrupt laws. Yet it is so; and it is only by several particular acts of parliament applicable to these various cases, that the various hardships I have enumerated are corrected or modified.

It is a hardship on a sheriff if he seizes goods of which the debtor is in possession and apparent ownership, and it should turn out that the possession and apparent ownership were not fraudulent, that the sheriff should be liable; and yet the circumstances may be such as that the sheriff has no means of ascertaining the ownership.

I think the hardship of a case ought not to form a prin-

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ciple on which the law should act. Society is so formed, that many persons fill relations which appear to induce great hardships. If these hardships be of sufficient importance for the legislature to interfere, they will do so.

If cases of hardship be brought before the Court, they will frequently interfere so as to relieve the sheriff, if the law will permit it. And a late act of parliament, often called the Interpleader Act, in some degree acts as a relief to the sheriff; but that has nothing to do with the general liability of the sheriff.

But then the defendant says, that, by the constructions which have been put upon the statutes by the general administration of the bankrupt law, public officers, who have to execute process, are protected in cases like the present; and that, though for a number of years back there are cases, and the practice, while these cases have been in force, has been against sheriffs, yet these recent cases and practice are not according to law, and that the earlier cases are contrary; and that they, being the first that occurred after the bankrupt law was introduced, are to be regarded as the real existing law, not to be overturned by late decisions, and more particularly, as the defendant says, that the whole of these modern cases and modern practice have been founded on a misapprehension of the case of *Cooper v. Chitty* (a); and that, in all the later cases, the former decisions have not been brought before the Court. The earliest case urged on the behalf of the defendant, is *Bailey v. Bunning* (b); and the Judges there say, that the sheriff's taking was lawful by virtue of the writ. But in *Siderfin*, the reporter makes a query—"For it is affirmed that the practice is, that the sheriff shall be found guilty, if the party was then a bankrupt."

The special verdict has been examined in *Bailey v. Bunning*, and it appears that the sheriff had caused to be

(a) 1 Burr. 20; 1 Blackst. 65; 1 Ken. 395. (b) 1 Lev. 173; 1 Sid. 271.

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made the debt, of the goods, chattels, and monies of the bankrupt; but that they remained in his hands, and he had not sold or delivered them to the judgment-creditor; and then it states a demand and refusal; and it concludes with saying, that they are ignorant whether the *taking* was lawful. This special verdict is quite imperfect: there is no conversion found, and the question by the jury is, whether the *taking* was lawful; and that may account for the language of the Judges, that the taking was lawful, which may have been meant to apply to the original taking only, and not to say whether, if the goods had been sold, the sheriff would be liable: and, therefore, on such an imperfect case, and the very slight way in which it is mentioned in the two reports, makes the decision amount to very little, especially as one reporter states the practice to be contrary. This case, however, as far as it goes, is confirmed by what the Court say in *Phillips v. Thompson* (a).

Turner v. Felgate was mentioned in *Bailey v. Bunning*. It is reported in 1 *Lev.* 95, 2 *Sid.* 125; and it has been considered as applicable to the present case. That was an action of trespass against the creditor, who had obtained judgment and levied under a *fiery facias*, and the judgment was afterwards set aside by rule of Court. And it was there said, that the sheriff was not liable, because he acted in obedience to the king's writ; and that there is a difference between the party and the sheriff in that respect. There is not the least doubt about that; the sheriff is protected by the writ, and he need only plead that by way of justification to an action of trespass. But the party must plead the judgment. The sheriff is bound to obey the writ: but the party must shew that he had authority to sue out the writ, and that authority is the judgment. If the party was not bound to shew the judgment,

(a) 3 *Lev.* 191.

it would be in the power of any man who had obtained no judgment to sue out any sort of writ of execution for any amount that he thought proper.

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But that does not apply to the present case; here the writ directs the sheriff to take the goods of *A.*; and if he does take the goods of *A.*, it is immaterial to him whether there was any judgment against *A.* or not.

But the complaint is, that he does not obey the king's writ, and that, being directed to take the goods of *A.*, he takes goods which, though in the possession of *A.*, yet, by operation of the bankrupt law, ultimately turn out in point of law not to be the goods of *A.*

The case of *Letchmere v. Thorowgood* (a) is also cited in favour of the defendant. That was an action of trespass against the sheriff. One of the points in dispute was, whether the crown under an extent, or the party under a *fi. fa.*, was entitled to the goods. But the Court said, the sheriff was not liable in this action: and, there is no doubt, but that, according to the modern cases, he is not liable in trespass. For, in *Smith v. Milles* (b), it was held, that an action of trespass will not lie against the sheriff who seizes goods after an act of bankruptcy and before the issuing of a commission, even though he afterwards sells them. But, at the same time, I must observe, that in the report of the case of *Letchmere v. Thorowgood*, in 3 *Modern*, there is nothing said about the liability of the sheriff.

Afterwards, an action of trover was brought against *Toplady*, the party, and *Thorowgood* and another (c), for taking the goods, and they pleaded the judgment in the former action; and it was held to be a bar. But that was decided only on the technical ground of law, that, after a judgment for the defendants in trespass, the plaintiffs could not recover in an action of trover for a conversion of the

(a) 3 Mod. 236; 1 Shower, 12; Comb. 123.

(c) 1 Shower, 146; 2 Ventris, 169.

(b) 1 T. R. 475.

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same goods. But there is not a syllable said in the latter case as to the liability of the sheriff; and I think no argument can be applied from any reasoning upon technicalities and the form of action, as to whether the sheriff is liable for seizing and selling goods under circumstances like the present. *Cole v. Davies* (a) is also cited for the defendant. Lord Chief Justice *Holt* there held that the sheriff was not liable to an action of trover under circumstances like the present. That case, as far as it goes, is in point for the defendant, but it is only a *Nisi Prius* decision. As to the other cases, of *Bailey v. Bunning*, and *Letchmere v. Thorowgood*, considering the imperfect manner in which they are reported, and considering also the special verdict in *Bailey v. Bunning*, I think they only amount to a declaration of the opinions of the Judges there, that, generally speaking, the sheriff was not liable, but by no means to a judgment upon a case like the present, distinctly brought and argued before them; and that, therefore, the Courts in late times are not so far bound by those cases, but that they may take another view of the case without being considered as unwarrantably overturning former decisions. The case of *Cooper v. Chitty* is the leading case on the subject in more modern times. I admit, that the facts of that case are not the same as here; for there the sale was after notice of the act of bankruptcy, and after the commission and assignment; and that the decision would not of itself be sufficient to authorize the Court to give judgment for the plaintiff. That case has been followed by a variety of other cases, in some of which at least the facts were the same as the present. I do not think it at all necessary to go through these cases and comment upon them, and upon the language used by particular Judges, as that has been so fully done already. The result of these cases fully satisfies my mind, that in the present case the bailiff is liable; and I may say in addition, that I have known a great many cases

(a) 1 *Ld. Raym.* 724.

tried at *Nisi Prius*, in which the point has never been doubted. And I would also add in conclusion, that if the cases of *Bailey v. Bunning*, and *Letchmere v. Thorogood* had been fully brought before the Court upon a case like the present, and the judgment given according to the opinion there expressed by the Judges, yet, if I had found, that, for a series of years, there had been so many decisions and constant practice the other way, then, inasmuch as the later authorities are according to what would be my opinion, if the question was now for the first time to come under consideration, I should say that the Court ought to act upon the late authorities, though by that means the former decisions should be overturned. I have not given any opinion as to the effect of the respective indemnities to *Jewison* and to *Ingham*, as I am of opinion that they are both liable to this action, independent of any question of indemnity. Upon the whole of the case, I am of opinion that the judgment of the Court of *Exchequer* ought to be reversed.

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PARK, J.—This case has been so fully discussed by my learned brethren who have preceded me, that I am much tempted merely to express my concurrence with the majority. The only reason why I prefer the contrary course is, that I may not be supposed to have taken no pains to instruct myself in a matter where the Court of *Exchequer* has delivered a unanimous judgment, supported, as that judgment is, by my learned brother sitting next me, and which judgment the majority of the Judges now present think ought to be reversed.

The real point in this case is, whether a sheriff or bailiff of a liberty, who seizes the goods of a man under a writ of *feri facias*, a secret act of bankruptcy having been previously committed, and which the sheriff had no notice of, is liable to an action of trover, at the suit of the assignees of such man, under a commission of bankruptcy subse-

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quently issued, founded upon the said previous act of bankruptcy. I am of opinion that he is.

It may certainly be hard upon a sheriff or bailiff that he should be held liable in a case like the present, where no misconduct can be imputed to him or to his officers; but it appears to me that if, on account of such hardship, we were to affirm this judgment of the Court of *Exchequer*, we should break in on an established rule of law; established confessedly for above seventy years; admitted as a clear rule in all the text books of writers upon bankrupt law; acted upon by all practisers, in their advice to clients; and confirmed by some of the ablest men that have ever adorned the judicial seat, from Lord *Mansfield* down to the present day, namely, from the year 1756.

The question really is, whether these goods, when the bailiff seized them, were the goods of the bankrupt, or the goods of the assignees by relation to the act of bankruptcy. That the act of bankruptcy vested the goods in the assignees seems not to be disputed: then, certainly, the process having commanded that the goods of *A.* shall be taken, the sheriff must at his peril answer, if he take goods which have become the property of *B.*, by being sued in an action of trover. Mistake as to the right of property at the time of the seizure, both in the plaintiff herself and in the sheriff, as was truly stated by my brother *Bayley* in the case I am about to quote, will not excuse the sheriff. And indeed that was a very hard case: I mean the case of *Glasspoole v. Young* (a), where a writ of execution issued against a man named *Meering*, the supposed husband of the plaintiff, who really believed herself to be his lawful wife at the time of the seizure of the goods, which had been her property; but after this, the woman, discovering that a former wife was living, and the marriage with her consequently void, re-

(a) 9 B. & C. 696.

covered the value of the goods against the sheriff in an action of trover, by the unanimous judgment of Lord *Tenterden*, and my brothers *Bayley*, *Littledale*, and *James Parke*. The rule of law, then, is undoubted, that the sheriff must at his peril seize the goods of the party against whom the writ issued; and if they have ceased, without fraud, to be the goods of that party, the sheriff is liable if he seized them, though not cognizant of the change of property. The hardship, then, can be no argument if the law be clear, for there are many, many cases in which the law has thrown a similar liability upon the sheriff, not regarding the hardship of the case; and I am not aware of any exception in any bankrupt act (my brother *Bosanquet* has fully gone into them) in favour of the sheriff. For, as Lord *Ellenborough* said, in the case of *Stephens v. Elwall* (a), the Court must be governed by the principles of law, and not by the hardship of any particular case; "for, what can be more hard," says his Lordship, "than the common case of trespass, where the servant has done some act in assertion of his master's right, that he should be liable, not only jointly with his master, but, if his master cannot satisfy it, for every penny of the whole damage, and his person also should be liable for it." The sheriff is in a much better situation; for though he must often act at his peril, and sustains losses, yet he has considerable fees in poundage, &c. to remunerate him for such danger.

It is admitted, indeed it was impossible to deny, that the point has been expressly decided over and over again; but it is desired that all those cases shall be overturned, because they all, it is said, depend upon the case of *Cooper v. Chitty*, and none of the latter cases, they say, refer to the cases before *Cooper v. Chitty*, which are at variance with that decision: for those who wish to overturn the cases, allege, that, if the Courts had looked at those prior

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decisions, they never would have upheld Lord Mansfield's doctrine, and that of his brethren. This seems to me a most disingenuous argument, and not complimentary to the Judges who, numerous and powerful in knowledge and talent as many of them have been, have decided those latter cases. It is true, that in the arguments of some of them, the older cases of *Bailey v. Bunning*, *Letchmere v. Thorowgood*, and others, have not been mentioned. But are we thence to infer that those learned Judges were unacquainted with, or did not weigh, those decisions? The fact is directly otherwise; and the fair and legitimate inference is the reverse. The later Judges, it is said, have followed *Cooper v. Chitty*. Be it so; then they must have read it—and they could not do so without seeing the cases which I have alluded to reasoned and commented upon, both at the bar and upon the bench; and therefore the fair and legitimate inference is, that the Judges were of opinion that *Cooper v. Chitty*, if it did not overturn the former decisions, was more consonant to reason, public convenience, and sound policy, in holding the sheriff liable even in the case of mistake and ignorance; and it is to suppose that the Judges shut their eyes, and remained wilfully ignorant of the prior cases: besides, it is a mistake in the judgment of the Court of *Exchequer*, when they allege that none of the cases later than *Cooper v. Chitty* refer to *Bailey v. Bunning*; for the direct contrary is the fact, as clearly proved by my brother *Patteson*. In reference to the other cases, I have considered the cases alluded to; and although I do not highly approve of very long and elaborate judgments, yet I must say that, in all the reports of the different stages of the case of *Letchmere v. Thorowgood* and *Letchmere v. Toplady*, it is most difficult to get at the real history of that case; but taking them all together, one thing seems clear, that the sheriff was held not to be a trespasser in such a case as this; and no Judge, in *Cooper v. Chitty*,

nor in any case since, has so considered him. It was also held, in *Letchmere v. Toplady*, where trover was afterwards brought, that it would not then lie, not that it would not lie, generally speaking, but that the plea of the judgment in the action of trespass against the sheriff was a good bar by way of estoppel. Whether the Court was right or wrong in this latter opinion, I do not stop to inquire; if wrong, it weakens the authority of the case altogether; if right, it does not militate against the position that trover generally will lie, though trespass will not, against the sheriff. In *Comberbach*, 123, he makes Lord *Holt* say that the property of the goods is vested by the delivery of the writ of *fiery facias*, even against the king. This, Lord *Mansfield* truly says he could not have said, for no inception of an execution can bar the crown. Lord *Holt* himself, in another case, says the direct contrary to what *Comberbach* here reports of him; for, in *Smallcomb v. Cross* (a), his Lordship says, that "the property of the goods is not absolutely bound by the delivery of the writ to the sheriff." And this question is now happily set to rest by the decision of the House of Lords last session in *Giles v. Groter*; besides, it is difficult to understand when and by whom this case was decided. 3rd *Modern* decided this case in *Trinity* Term, 4 *James* 2, at which time Sir *J. Holt* was not Chief Justice; for it is clear matter of history that he was appointed upon the Revolution, in the room of Sir *Richard Wright*, who continued all *Michaelmas* Term following the landing of King *William* to be Chief Justice; and no *Hilary* Term was kept in consequence of the Revolution. *Comberbach* makes the decision take place in *Trinity*, 1st of King *William*, twelve months after the date of the former; and *Showers* states the decision to have taken place in *Easter*, 1st of King *William*. The case of *Letchmere v. Toplady* was in the *Common Pleas*, *Hilary* 2nd of *William & Mary*. My only object in making these ob-

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servations is, to shew the extreme inaccuracy and inattention of those persons who, by these inaccuracies in dates, may be presumed to have taken their accounts of what passed from others, but not to have been themselves present; for even the publisher of 3rd *Modern* says, in his preface, that he must confess that some of the late reports (of course not meaning his own) are collected with very little judgment. *Bailey v. Bunning* (a), which is also mentioned in *Phillips v. Thompson* (b), was undoubtedly an action of trover; but, for the reasons so ably given by my brother *Bosanquet*, and which, therefore, I shall not repeat, it is clear that, even giving full credit to the decision, it does not at all govern this case: *Siderfin* does not agree: but even if it were more applicable to this case I cannot feel all that respect for such unsatisfactory accounts of that decision, so much at least as to induce me to overturn the uniform and constant train of judgments of seventy-six years and more, by some of the ablest Judges that *Westminster-hall* has seen.

The oldest man now living remembers no other rule upon this point, than that which it is said *Cooper v. Chitty* established. Admitting, for argument only, that that was a novel decision, yet no inconvenience has resulted from it; the Judges have been followers of it, counsel and attornies have advised on its strength, and merchants have, as assignees, known and abided by the rule; and it is, as we well know, frequently immaterial how points of law are determined, provided they are known and uniform; and certainly this point of law has been known and uniform for the long period I have mentioned. I was, therefore, surprised to observe, in one of the arguments of this case in the Court below, a statement that there had been some recent decisions on this point. Who were the Judges who decided *Cooper v. Chitty*? Lord *Mansfield*, who is not, I believe, remem-

(a) 1 Lev. 173.

(b) 3 Lev. 191.

bered by any one now present, myself excepted; but he was a Judge, who, in the expressive language of one who knew him well, and who could duly appreciate his learning and ability, so enlarged and commented upon cases, and was so powerful in argument that his hearers were sometimes lost in admiration at the strength and extent of the human understanding. His colleagues, when *Cooper v. Chitty* was decided, were no other than Sir John Eardley Wilmot, afterwards Chief Justice of the Common Pleas, the very learned Mr. J. Foster and Mr. J. Dennison. Was it a hurried decision? It was argued in two different terms by four of the most eminent advocates of that day; after which the Court took time to deliberate; and then Lord Mansfield delivered a clear, lucid, and argumentative judgment of himself and his three most learned brethren, and commented upon the cases of *Bailey v. Banning* and *Letchmere v. Thorowgood* in a way which shews at least that they had by no means been overlooked by them. The case of *Cooper v. Chitty* is best reported in the 1st Lord Kenyon's Cases, 395; although there is no material difference between Kenyon, Blackstone, and Burrow; and whoever reads with attention Lord Kenyon's note, though his Lordship was then a very young man, will discover all the accuracy and acuteness of that great mind so well remembered by us who saw him, as many of us saw him, in the full splendour of it; and when reading this luminous judgment of Lord Mansfield's, as reported by his eminent successor, I cannot but lament that, in the course of some of the arguments in the case now under consideration, Lord Mansfield should be charged with making a very useless display of what would appear to be legal knowledge, and filling up six pages with what might have been expressed in six lines. I am sorry to say, the judgments of modern days cannot claim a superiority in conciseness and beauty above those of Lord Mansfield. Were I, after the discussion this case has undergone at the bar,

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and after the luminous argument of my brothers who have preceded me, to travel through and comment upon all the cases since *Cooper v. Chitty*, which have been uniform, I should indeed be justly chargeable with making an useless display of legal knowledge. I shall merely mention them, and a host of learned persons who have affirmed the doctrine.

Smith v. Milles (a) was an action of trespass; and *Ashurst* and *Buller*, Justices, after time taken to consider, held it would not lie; but expressly took the distinction between trover and trespass; and a long passage of Lord *Mansfield's* judgment in *Cooper v. Chitty* is read by Mr. Justice *Ashurst*, and adopted by the Court. Mr. Justice *Ashurst* was not an eloquent man, but he was always reckoned a learned Judge; and of the high legal character of Mr. Justice *Buller* all the profession formed a very just estimate. In *Potter v. Starkie* (b), Mr. B. *Wood* first, and the whole of the Court of *Exchequer*, held that the sheriff was liable in trover, though he seized, sold, and actually paid over the money before a commission issued, and before any notice; saying that this necessarily followed from *Cooper v. Chitty*; for it was an unlawful interference with another's goods. In *Stephens v. Elwall* (c), it was held, that a servant may be charged in trover, though the act of conversion be done for the benefit of the master; and Lord *Ellenborough* observed, that the Court must be governed by the principles of law, and not by the hardship of any particular case. *Wyatt v. Blades* (d) is supposed (in the judgment we are now considering) not to shew sufficiently what the opinion of Lord *Ellenborough* was, in this judgment, as to the point we are now considering, nor whether the point was at all raised. But the facts of that case were exactly similar to those now before us; and it seems to me

(a) 1 Term Rep. 475.

(b) 4 M. & S. 260.

(c) 4 M. & S. 259.

(d) 3 Camp. 396.

impossible that Lord *Ellenborough*, though the counsel might not have stated the case with much precision, could have decided as he did, if he had not had the supposed point of *Cooper v. Chitty* in his view. The case of *Lazarus v. Waithman* (a) was decided by the Court of Common Pleas during the Chief Justiceship of Sir *R. Dallas*, in the same way as *Cooper v. Chitty* was. I speak not of any opinion of mine in that case, but I can speak of two of the Court, happily still alive, though no longer of our body; two better lawyers could not be found; I mean my brothers *Burrough* and *Richardson*; the former states the point to have been settled long before he knew *Westminster-hall*; the latter, and no man had more practical experience, says that the law, as to a question of this nature, had been long since settled, and had frequently occurred of late years at *Nisi Prius*. There must, therefore, have been an accidental mis-statement in the judgment below, when it is supposed that *Lazarus v. Waithman* was decided altogether upon *Cooper v. Chitty*, and that none of the earlier cases were mentioned. Those who know, as I of course did, the infinite pains that most valuable person, Lord Chief Justice *Dallas*, took to inform himself, by diligent research, and to procure information from others, of every case and decision that at all bore upon matters before him, will not readily believe he was not aware of the cases of *Bailey v. Bunning* and *Phillips v. Thompson*; but it unfortunately happens, that, even if the Lord Chief Justice of that day were not entitled to all the commendation I most cheerfully and affectionately bestow upon him, the very cases supposed to have been overlooked by the Judges, *Dallas*, *Burrough*, *Richardson*, and myself, were expressly quoted and relied upon by the learned counsel for the sheriff, in *Lazarus v. Waithman*, and in *Price v. Helyar* (b), which I only quote as an authority of three

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(a) 5 B. Moore, 314.

(b) 1 Moore & Payne, 541; S. C. 4 Bing. 597.

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Judges of the Court, because my learned brother who sits next me thinks there was some mistake as to its having been the unanimous opinion of the four Judges. We have to add the weight and authority of that very eminent and acute Judge, Lord Chief Justice *Best*, delivering a most luminous argument, after time taken to consider, as the joint opinion of his Lordship, myself, and Mr. Justice *Burrough*, the facts of that case being not possibly distinguishable from this. But the weight of authority and of name does not rest here: for, in *Carlisle v. Garland* (a), Lord Chief Justice *Tindal*, my brothers *Bosanquet* and *Alderson*, all maintained the same point; and again, that most eminent person, and ever to be lamented Judge, Lord *Tenterden*, with the concurrence of my brothers *Littledale*, *Taunton*, and *Patteson*, in *Dillon v. Langley* (b), expressly like this case in every circumstance, says, "the sheriff must obey the writ, but he is also required to know whose goods he takes. We ought to consider ourselves bound by the many decisions which have taken place, establishing the liability of the sheriff." And then his Lordship refers to the case of *Carlisle v. Garland* as in point. Indeed it is admitted in the Court below, that the cases of *Potter v. Starkey*, *Lazarus v. Waithman*, *Price v. Helyar*, *Carlisle v. Garland*, and *Dillon v. Langley*, cannot be distinguished either in facts or reasoning from the case now under consideration. I have formerly referred to the case of *Glasspoole v. Young*, as a much harder case against the sheriff than the present; and I shall not restate it: I only mention it for the sake of adding to the list of legal luminaries, who, for the last seventy-six years, have uniformly concurred in this opinion till now, the names of two eminent Judges, Mr. Justice, now Baron, *Bayley*, and Mr. Justice *James Parke*. If, therefore, I even thought the case of *Cooper v. Chitty* wrongly

(a) 5 Moore & Payne, 102; S. C. 7 Bing. 298. (b) 2 B. & Ad. 131.

decided, and which some of my brothers seem to think, I do not feel myself strong enough, nor do I feel myself justified in setting up my judgment against the immense host of those great men who have so long considered this as a closed and settled point of law.

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I may add, without impropriety, that Lord *Tenterden*, in a conference with all the Judges who had heard this case argued, concurred in the opinion I have formed; and when the opinions of that most eminent, most learned, and ever to be lamented Judge, as well as the humblest, and most unassuming of men, are mentioned, they will claim and receive from every other Judge and lawyer, the most profound and unfeigned attention and respect; especially when I find him in a case having no connection with this, declaring that the Judges of former times (and I speak of the uniform judgment of above seventy years) ought to be followed and adopted, unless we can see very clearly that they are erroneous; otherwise there would be no certainty in the administration of the law. When, therefore, I find this law uniformly acted upon for much above seventy years, I rejoice, after a long judicial life, to declare my firm belief, that a new practice on this point should not be introduced. I think it cannot be done without danger. For these reasons, and upon these authorities, I think the judgment of the Court of *Exchequer* ought to be reversed.

TINDAL C. J.—It has become unnecessary for me, after the full discussion which this case has undergone, to state at length the grounds upon which my judgment has been formed, or to comment upon the several cases which have already been brought before the notice of the Court. I shall endeavour, therefore, to compress, within as short a compass as is consistent with making myself intelligible, the reasons upon which my mind has been brought to the conclusion, that the judgment of the Court below ought to be reversed.

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The question arising upon the special verdict is in substance this: whether the sheriff, who has seized the goods of a defendant under a writ of *fi. fa.*, and has sold and delivered them to the judgment-creditor in satisfaction of the debt, after a secret act of bankruptcy committed by the defendant, but before the issuing of a commission against him, is liable to an action of trover at the suit of the assignees subsequently chosen under such commission. And upon this question I can arrive at no other conclusion, upon the construction of the statute upon which the bankrupt law now stands, without any reference to the cases decided on the point, than that the seizing and subsequent sale of these goods to the judgment-creditor is a wrongful conversion, so as to make the sheriff liable in an action of trover.

The answer to the question above put, rests upon two distinct propositions; first, that the goods in question were, at the time of the sale under the writ, the property of the assignees, having become their property by relation from the time of the act of bankruptcy; secondly, that there is no exception, either express or implied, in the bankrupt act, in favour of a sheriff executing the king's writ. I shall proceed to consider each of these positions separately, and in order. First, upon the just construction of the late statute, the goods at the time of the sale belonged to the assignees, and the sale was a wrongful conversion, because it was a sale of their goods;—that the ownership of the goods was not divested out of the bankrupt by the act of bankruptcy, or by the issuing of the commission, or by any other act than the execution of the commissioners' assignment, may indeed be readily admitted. If any authority were necessary for that point, the cases of *Cary v. Crisp* (a) and *Brassey v. Dawson* (b) are decisive upon the subject. But it seems equally clear, that, by the neces-

(a) 1 Salk. 108.

(b) 2 Str. 978.

sary construction of the clause by which the commissioners are directed to "assign all the bankrupt's money, goods, chattels, and debts, wherever they may be found or known;" such assignment, whenever made, shall operate by relation, so as to carry to the assignees all the property which the bankrupt had at the time of the act of bankruptcy.

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The twelfth section of the recent act, 6 *Geo. 4*, upon which the law now stands, varies indeed in some particulars of expression from the language of the earlier acts; but not so materially as to afford a ground for any difference of construction in this particular, in which it is certain no real difference could have been intended. It has been observed, in one case, by Lord *Hardwicke*, then Chief Justice of the *King's Bench*, in *Brassey v. Dawson* (a), that this relation is a fiction of the law, and that fictions are not to be favoured. But I must confess myself unable to consider it as any fiction at all; for it appears to be the direct positive enactment of the legislature, expressed in plain and unequivocal terms. That such an enactment is indeed attended in some cases with hardship must be admitted; but there seemed to have been no alternative for the legislature, but either to allow these individual cases of hardship, or to submit to a general inconvenience; for, unless the assignees were made to take the property of the bankrupt as it stood at the time of the bankruptcy, this general inconvenience must follow, that the estate would be subject to all the fraudulent or improvident dispositions and conveyances which failing men, in a state of bankruptcy, will inevitably have recourse to. That such relation was intended is evident from the consideration, that, in various instances, where the individual hardship was greater than was warranted by the general convenience, the legislature has from time to time, by new statutes, cut

(a) 2 Str. 978.

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down the relation in particular cases; as, first, in the case of payment of *debts* to a bankrupt before notice of an act of bankruptcy (1 *Jac.* 1, c. 15); next, in the case of the sale of real property by the bankrupt, where the commission is not sued out within five years after the secret act of bankruptcy (21 *Jac.* 1, c. 19); again, in the case of payment by the bankrupt to creditors for goods sold (19 *Geo.* 2, c. 32); and, lastly, in the case of conveyances, contracts, and other dealings and transactions with bankrupts, *bond fide* made and entered into more than two calendar months before the date and issuing of the commission (46 *Geo.* 3, c. 65). All which provisions of the legislature do prove and establish two points: first, that such relation to the act of bankruptcy did at the time exist under the previous enactment; secondly, that nothing short of the authority of Parliament was sufficient to relax the severity of the former law. The Courts of law have uniformly held such construction of the bankrupt acts. I will refer to one case only, namely, the judgment of Lord *Hardwicke*, when Chancellor, in *Billon v. Hyde* (a), because it appears to me to import that at that time he did not consider this relation to the act of bankruptcy to be a fiction of law. Lord *Hardwicke* observes—"It is said that this rule (the relation to the act of bankruptcy) founded on this act of Parliament, is contrary to the general reason of the law, which says, that fictions of law and legal relations shall not enure to the wrong of any one, which is a general rule, invented to support the right and equity of the case. But the reason of taking this case out of that rule is plainly this, and the law did intend it on this general rule, that it is better to suffer a particular mischief than an inconvenience, and the Legislature foresaw that there would be a particular mischief, which they cured by that proviso, but did not extend it further, because the inconvenience on the other hand, of suffering bankrupts to

(a) 2 Ves. 310.

dispose of their effects by contracts or judgments, would put it in their power to defeat their just creditors of their debts, so that it would be difficult commonly to find out whether there was a mixture of fraud; so the Legislature thought it better to lay down that general rule." Upon these grounds it may, I think, be safely concluded, that all the property belonging to the bankrupt at the time of his bankruptcy passes to his assignees by the commissioners' assignment, whatever may be the time at which such assignment is executed.

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The second ground above referred to is, that there is no exception, express or implied, in the bankrupt act in favour of the sheriff executing a writ after a secret act of bankruptcy. So that, whilst servants of the bankrupt, judgment-creditors, who set the law in motion, vendees at the sheriff's sale, and all other persons who assist in selling, disposing, or removing the goods of a bankrupt after a secret act of bankruptcy, would confessedly be held guilty of a wrongful conversion. Neither is the sheriff, by reason of his situation and character, exempted from the same liability. That there is no express exception is evident from perusing the words of the statute; if there be any exception, therefore, it must be one that is implied. Now, the only ground upon which such implied exception in favour of the sheriff is contended for, resolves itself at last into the hardship of his case. It is said to be a hard measure to make him answerable where he is obliged to execute the writ, where he is acting honestly in the execution of his duty, and is under an invincible ignorance at the time, that the goods are the property of the assignees. The question therefore is, whether such hardship on the sheriff can be held upon any legal ground to work an exception in his favour.

If once this principle were to be admitted, it would operate not only in cases where the ignorance of the sheriff was really invincible, but in many others, where a small exercise of caution, inquiry, and investigation would have been

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sufficient to have prevented him from executing the writ: such a construction, therefore, in order to prevent a mischief to the individual in a few cases, would occasion an inconvenience to the creditors at large in many. Again, in how many other cases does the law hold him responsible where he is equally honest in the performance of his duty, and his difficulty in choosing the right course is equally great? In an execution against *A.*, if he sells the goods of *B.* which are in *A.*'s possession and apparent ownership, by loan or otherwise, he is liable in trover to the rightful owner, even after he has paid over the money. If bail are tendered to him, which appear sufficient at the time, he is bound to accept them, and discharge the defendant from his custody; yet if they fail before bail above is put in, the sheriff may become answerable in damages to the plaintiff, and not improbably for the amount of the debt. He is answerable generally, *civiliter*, for all the acts of his bailiffs, for voluntary escapes permitted by them, and for extortion. If the hardship is urged in those cases, the answer is, that the officers give security to the sheriff; but it is obvious, that, if their securities fall short, he is answerable to the party in his purse or his person. I would refer to the late case of *Gluspoole v. Young* (a) already stated by my brothers *Park* and *Taunton*, where the sheriff was held liable for the execution of his duty, under circumstances of ignorance equally invincible as the present. By analogy, therefore, to the law by which the sheriff's responsibility is governed in many other cases, the mere circumstance of hardship ought not to form any ground of exemption from his liability in this particular case. After all, the office of sheriff is an office not only of risk, but one of profit also. So says Lord *Mansfield* expressly in the case of *Cooper v. Chitty*, so often referred to—an office of which men are ready to take the risk upon themselves for the sake of the profit, in the character of under-

(a) 9 B. & C. 696.

sheriffs, bailiffs, and other officers, giving the sheriff a sufficient indemnity to secure him against any damages or loss from acts done by them in his name. But the strongest argument against implying an exception in favour of the sheriff appears, to my mind, to be the course pursued by the legislature itself above adverted to, who have by new and distinct statutes, from time to time, created new exceptions from the retrospective operation of the assignment, wherever the hardship to individuals was deemed sufficient to call for it. And as the legislature has so done in many cases, but not interfered in the present, why is such exception to be engrafted on the statute by us, whose duty it is to declare the law, and not to make it? Upon these grounds, therefore, it appears to me that no exception of any kind exists in the bankrupt act in favour of the sheriff, however honestly or innocently he may have acted in the execution of the writ directed to him, if he does, in fact, take under it, not the goods of the defendant in the suit, but those of his assignees. And this appears to me to dispose of the whole point in controversy; for, if the sheriff appears to be liable to the action upon the construction of the statute itself, without reference to any of the cases upon the point, I think it must at once be admitted, that there is no such weight of authority in favour of the sheriff from the decided cases, as to call for any contrary decision. Indeed, the weight of authority to be derived from cases subsequent to that of *Cooper v. Chitty*, seems to be admitted in the argument of this case in the Court of *Exchequer* to be against the sheriff; but it is contended, that all the latter cases proceeded partly upon a misconception of the case of *Cooper v. Chitty*, and partly upon the ground that the earlier case of *Bailey v. Bunning*, and some others, had not been brought to the attention of the Courts of law, when deciding such latter cases. I shall satisfy myself therefore with making a few observations upon the two cases of *Cooper v. Chitty* and *Bailey v. Bunning*, as

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the learned Judges who have preceded me in argument have gone into a more laboured detail of the modern cases; and I will only observe, that they form a connected chain of decisions against the sheriff, some in each Court of Common Law at *Westminster-hall*, for the last sixty years. Now, with respect to the case of *Cooper v. Chitty*, it may be admitted at once that it forms no authority for the present case. The seizure by the sheriff was indeed after a secret act of bankruptcy, but the sale did not take place until after the assignment, and at a time when both commission and assignment were known to the sheriff. There could, therefore, be no doubt but that such a sale, with such notice, was a wrongful conversion by the sheriff, although, however, the facts of the case do not agree with the present. The judgment of Lord *Mansfield* lays down and adopts a broad distinction between the liability of the sheriff in an action of trespass, and his liability under the same circumstances in an action of trover—holding, that the former action was not maintainable, but that the latter was. And it seems a sensible and rational distinction, that the sheriff having acted innocently in the taking, should not be liable in that form of action in which the jury may give damages for the taking distinct from the value of the goods—but that he should, nevertheless, be subject to that action, in which the proper measure of damages is the actual loss which the plaintiff has sustained by the sale; and the case of *Bailey v. Bunning*, when rightly understood, affords no authority in favour of the sheriff, where he has sold the goods. Upon looking at the record in that case, it appears that it was an action against *Mawley*, the judgment-creditor, and *Bunning*, the bailiff of a hundred within the county of *Northampton*. The bailiff seized the goods after a secret act of bankruptcy; but he never sold the goods at all, for the jury expressly find, “that the money, goods, and chattels, still remain in the hands of *Bunning*, neither sold nor delivered to *Mawley*.”

And upon this finding the jury declare their doubt to be whether the goods were well taken or not by pretext of the writ of *fi. fa.*? Certainly, a very inartificial finding; and the Court, after argument and time to consider, held that the original taking was lawful. The reporters do indeed put the decision upon the ground of the official character of the sheriff, because the taking by him was lawful by virtue of the writ. But if the bailiff in that case, as in the present, had not only seized the goods, but had sold them, or delivered them over to the judgment-creditor, there is nothing in the case of *Bailey v. Bunning* to shew that he would not have been held guilty of a wrongful conversion. I look upon the case of *Bailey v. Bunning*, therefore, to be a single case, standing upon very peculiar circumstances, and decided upon very narrow grounds; and that, in effect, it says no more than that, if the sheriff makes a seizure in obedience to a writ, which seizure is lawful at the time, then if he neither sells the goods, nor delivers them over to the judgment-creditor, but keeps them in his own hands as a stakeholder between the assignees and the judgment-creditor, the original act of taking shall not be held unlawful so as to sustain an action of trover. To that extent it shews the bailiff was favoured in his official character, but no further. But why, under the circumstances stated in that special verdict, a subsequent demand by the assignee, and a refusal to deliver up the goods to him, should not have been held a conversion, if the special verdict had been properly framed, I confess myself wholly unable to discover. But although the judgment of Lord *Mansfield*, in the case of *Cooper v. Chitty*, propounds a distinction between the responsibility of the sheriff, in the form of trespass and the form of trover, not called for by the circumstances of that case, no one can deny that such distinction has been adopted in numerous decisions in the Courts of *Westminster-hall* from that time to the present. It has been inserted in text writers on the law of bank-

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ruptcy as a distinction established by undoubted authority. It is laid down in digests of the law as an acknowledged principle. It has been acted upon by the practisers in *Westminster-hall* of the present day, during the whole of their lives, without the slightest suspicion or doubt of its soundness. Judicial decisions, in Courts of justice, are ranked by Lord *Hale* as one of the grounds or constituents of the common law (a); and if a series of judicial decisions are shewn, some in each Court of *Westminster-hall*, from the time of *Cooper v. Chitty* down to the present period, in which the sheriff has been held liable in trover for seizing and selling after an act of bankruptcy, but before a commission; if neither the case of *Cooper v. Chitty*, nor the cases which preceded it do, when rightly understood, contravene that principle, surely the question should be considered as at rest, even if the principle on which it was originally established were involved in doubt. I cannot conclude without adding a much greater weight to the opinion which I have formed than that which otherwise might belong to it, by stating, that, upon the discussion of this case amongst the Judges, after the argument, the late eminently learned and accurate Lord Chief Justice of the *King's Bench* declared it to be his opinion, that from the numerous decisions in the Courts of *Westminster-hall* the law was settled against the sheriff, so that it was no longer a subject for argument; and that even if the question were *res integra*, he should come to the same conclusion. For the reasons, therefore, which I have stated above, I think the present judgment should be reversed.

Judgment reversed.

(a) *Hale's Hist. Co. L. c. 4.*

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ROGERS *v.* JONES.

THE affidavit of justification of bail in this case, which was country bail, stated, that the bail were "possessed of" property of the amount required.

An affidavit of justification of bail must state that the bail are worth the requisite property.

Channell objected to the bail, because the affidavit did not state that the bail were "worth" the necessary amount as required by the rule *H. T. 2 W. 4*, s. 19; and observed, that they might be temporarily possessed of the requisite sum, but still have no property.

J. Jervis, contra, contended, that the affidavit was in compliance with the rule of *T. T. 1 W. 4*, and was precisely in accordance with the form there given; and that these rules had been drawn on the supposition that the terms were synonymous; and therefore the party was justified in using either expression.

The Court, however, held that the affidavit ought to have stated that the bail were "worth" the necessary amount, according to the rule *H. T. 2 W. 4*; observing, at the same time, that taking the two rules together, it might be contended, that, in the contemplation of the framer of the rules, the terms were synonymous.

Time granted—The costs to be costs in the cause.

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HIRST v. PITT.

It is not necessary, since 2 W. 4, c. 39, to state in a declaration in the *Exchequer*, that the plaintiff is a debtor to the king, or that he is less able to pay the king's debts.

DECLARATION on a summons under the 2 Will. 4, c. 39.—Special demurrer, assigning for cause that there was no allegation in the commencement of the declaration, that the plaintiff was a debtor to the king; and that the *quo minus* clause was omitted at the conclusion of the declaration.

Mansel, in support of the demurer, referred to *Nickling v. Dickens* (a), in which the Court held the want of the *quo minus* clause fatal; and he said, that the late rule (b) only gives a new form for the commencement of a declaration, but leaves the form of the conclusion as it was before.

LORD LYNTHURST, C. B.—I do not entertain the slightest doubt on the question. The declaration is on the new form of writ given by the recent statute. The jurisdiction before that statute was shewn by stating, that the plaintiff was a debtor to the king, and less able to satisfy the king's debts. That is now altered by statute, and a jurisdiction is given by writ of summons, so that it is no longer necessary to shew any jurisdiction by a statement of the plaintiff's being a debtor to the king, or by the clause of *quo minus*. The jurisdiction by *quo minus* is ended, and that writ no longer exists. How can it be necessary to make the statement in the declaration, when the reason of making such statement no longer exists?

BAYLEY, B.—*Nickling v. Dickens* was decided before the 2 Will. 4, c. 39. As soon as the statement ceased to be necessary for the purpose of giving the Court jurisdiction, the necessity of making such a statement at all ceased also.

Judgment for the plaintiff.

(a) Exch. T. T. 1832.

(b) Mich. Term, 3 Will. 4, rule 15.

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MAHONEY v. FRASER.

TRESPASS for breaking and entering plaintiff's dwelling-house, and turning him out of possession.—At the trial the jury found a verdict for the plaintiff, with 1000*l.* damages, that sum being the value of the leasehold interest of the plaintiff in the house.

A jury having assessed damages upon an erroneous principle, the Court, in granting a new trial, refused to limit the inquiry to the question of damages.

Hill, in *Michaelmas* Term last, had obtained a rule for a new trial on the ground of excessive damages, amongst several other grounds.

Hutchinson now shewed cause; and, upon the Court intimating that there must be a new trial on the ground of excessive damages, he prayed that the inquiry upon the new trial might be confined to that point, or at least that the defendant might not be allowed to question the points on which the Court thought the decision had been clearly right.

Sed per BAYLEY, B.—If, in respect of circumstances which have occurred at the trial, it be a matter of right in any party to have a new trial, the Courts cannot confine or limit the inquiry; where it is only a matter of indulgence they may (*a*).

Rule absolute for a new trial generally, on payment of costs.

(*a*) See the observations of *Gibbs*, C. J. in *Hutchinson v. Piper*, 4 Taunton, 555; and the judgment of the Court of King's Bench in *Bernasconi v. Farebrother*, 3 B. & Ad. 373. The objection in the present case would not have been a ground for a bill of exceptions,

there having been nothing exceptionable in the direction of the learned Baron who tried the cause. The present case, therefore, seems to carry the rule on this subject a step farther than the case of *Bernasconi v. Farebrother*.

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1833.

PROUDLOVE v. TWEMLOW.

Where a landlord seized and sold, under a distress for rent, growing crops, which were afterwards taken away by the purchaser, and it appeared that the crops were sold for the full value which they would have fetched if sold at the proper time, and the rent proved to be due exceeded the amount for which the crops sold:—*Held*, in an action of trover brought by the tenant, that he was entitled to nominal damages only.

CASE for an irregular distress, with a count in trover. At the trial before Lord *Lyndhurst*, C. B., at the last assizes for *Chester*, it was proved that the defendant had seized the goods of the plaintiff, and also the growing crops, under a distress for 120*l.* rent, and had sold the crops before they were cut; and the same were afterwards cut and taken away by the purchaser. The plaintiff obtained a verdict for 1*s.* damages on the counts for the irregular distress, and a verdict on the count in trover for 97*l.*, the value of the crops, which were proved to have been sold for their full value.

Cottingham had obtained a rule to reduce the damages on the last count, upon the authority of *Notts v. Curtis* (a), and *Biggins v. Goode* (b); contending, that, as the rent was more than the value of the crops, the plaintiff was entitled to nominal damages only.

Pollock and *J. Jervis* shewed cause.—Conceding that the jury, in assessing the damages on the counts for the irregular distress, had a right to deduct the rent, that does not extend to the count in trover. There is a distinction between an action on the case and an action of trover. In an action on the case, the landlord is entitled to deduct the rent; because all the damage the plaintiff has sustained is the difference between the value of the goods when sold under a regular or an irregular distress. Not so in trover. Here the sale of the growing crops was wholly void, and an action on the case was not maintainable. In *Owen v. Legh* (c), it was held, that a tenant, whose stand-

(a) 2 C. & J. 364, in note.

(b) 2 C. & J. 364.

(c) 3 B. & A. 470.

ing crops had been seized as a distress for rent, before they were ripe, could not maintain an action on the case under 2 *W. & M.* s. 2, c. 5, against the landlord for selling the same before the five days, or a reasonable time, had elapsed after the seizure, such sale being wholly void; and, therefore, he is not hurt. But if, subsequently, the corn is cut, under such circumstances, then trover may be brought to recover the property of the plaintiff; and in trover brought for that unlawful taking, the landlord has no right to set off the rent in reduction of the damages. There are cases where it has been held, that, where a bailee has transferred the goods, he is a wrong-doer, and has no right to deduct the amount of his lien (a). But, conceding that in trover the lien may be deducted, it does not here apply. Here the sale was wholly void, and the property was entirely the property of the plaintiff; and, therefore, we have no right to assume that the defendant is a wrong-doer. Suppose the Court should now enter a verdict for 1*s.* damages, what is there to prevent the landlord from recovering, by action, the rent which is now claimed to be deducted? There is a distinction between trover and an action on the case: in case, the party goes for damages; in trover, the plaintiff, on making out his title, is entitled to a verdict for the whole value of the property. [Lord *Lyndhurst*, C. B.—One asks, naturally, what is the damage the plaintiff has sustained? The party making the distress is lawfully in possession, and has a right, after a certain time, to convert the crops to his own use. He has done that immediately, instead of waiting until the proper time. Then, is there any rule of positive law which prevents his right to deduct the rent? Before these acts were passed, a party guilty of an irregular

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(a) See *McCombie v. Davies*, 7 N. P. 1358; *Lempriere v. Pasley*, East, 5; *Griffiths v. Hyde*, 2 Selw. 2 T. R. 485.

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rity in making a distress became a trespasser *ab initio*. So here, reasoning from that, the defendant would have been a trespasser. Then came the 11 *Geo. 2*, c. 19, s. 19, which says, that the party shall not be deemed a trespasser *ab initio*, but the party aggrieved shall recover full satisfaction for the damage he has sustained, by an action on the case.] That section is confined to *goods*. They were always liable to a distress at common law, but growing crops only became liable to a distress under the statute; and therefore the party must pursue the statute, or he becomes a trespasser, as before. The landlord here, in making this distress, has not pursued the words of the statute. The preamble of the 19th section of the 11 *Geo. 2*, c. 19, does not apply to growing crops. *Owen v. Legh* has decided that the statute does not apply where standing corn was sold, as the statute does not authorize it. The mere coming in and seizing would make the landlord a trespasser *ab initio*. When a remedy is given by statute, which the party had not by the common law, he must pursue the statute; and if he does not literally pursue the statute he makes himself a trespasser *ab initio*, and is just in the same situation as if the statute had never passed. The 8th section makes growing crops distrainable; and the recital in the 19th section shews that it was merely intended to remedy the misconstruction which had been put on the statute of *W. & M.* By the statute 2 *W. & M.* c. 5, s. 3, the landlord had only a right "to seize and secure any sheaves or cocks of corn, or corn loose or in the straw;" and that statute did not extend to *growing* crops. [*Bayley, B.*—The 8th section of the 11 *Geo. 2*, says, your corn, hay, and grass growing, &c., shall be your goods; and it superadds the old requisites of a distress.] It is submitted that the recital in the 19th section of the 11 *Geo. 2*, shews that that section was only intended to apply to cases where the party has seized *goods* as a dis-

trespass; and that, in such a case only, the party guilty of an irregularity should not be deemed a trespasser *ab initio*.

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Jones, Serjt., and Cottingham, contra, were stopped by the Court.

LORD LYNTHURST, C. B.—I am of opinion that this case is within the statute: the distress was originally lawful, but the sale was unlawful and irregular. By the express terms of the act, the party injured by an unlawful act committed after a lawful distress, is only to recover to the amount of the damage he has actually sustained. The wheat sold for more than its full value; and, as more than the amount was due for rent, the damages ought to be merely nominal.

BAYLEY, B.—I cannot bring my mind to doubt on the construction of the 19th section of this statute, that it must have been intended to apply to every thing that was distrainable under that statute. As to the rule of damages, it has been said already what the proper rule is, and the plaintiff has a claim for damages according to this rule. Here the distress was at first regular; afterwards an unlawful act was done:—then what damages is the plaintiff entitled to? Why, the difference between the amount for which the crops would have been sold if the sale had been regular, and what they actually sold for. In this case there was no difference, as it was proved that the crops were sold for more than they were worth. I am of opinion, therefore, that the damages ought to be reduced to the sum of 1*s*.

The other Barons concurred, and the rule was made—

Absolute.

TRUSSARDI, ROBERT and his imprisonment. Plea—
the general issue.

[illegible]

John Williams now moved to set aside the nonsuit. The charge upon which the plaintiff had been brought up on the warrant was over for the time; and, by the directions of the defendant, the plaintiff was stopped as he was leaving the office, and again placed at the bar. If this had been done by the interference of the magistrate, it might not have rendered the defendant liable in this form of action; but the magistrate did not at all interfere; and, in trespass, all are principals, the act of the party, whoever he was, who obstructed the plaintiff from going out,

at the suggestion of the defendant, was, in point of law, the act of the defendant. The magistrate's presence could not alter the case, for he did not interfere until the plaintiff was brought back. [Lord *Lyndhurst*, C. B.—All that the defendant did, was saying to the magistrate, I have also a charge of forgery against him. *Bayley*, B.—It is whilst he is before the magistrate, and is nothing but making a fresh charge to the magistrate.] A third party must plead such defence specially, as in aid of the magistrate or party acting under the warrant. [*Bayley*, B.—Not if it be not an act of trespass. The taking is not the act of the defendant. He only puts the law in motion; and if he does so improperly, he is liable in an action on the case, though not in this form of action.]

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LORD LYNDHURST, C. B.—I am still of opinion that no *trespass* was proved in this case.

BAYLEY, B.—Here the defendant was not present at the original arrest; he only gave information, on which the magistrate acted. Then, by order of the magistrate, the defendant was seized; that was not the act of the defendant, though, if he had been present, he would have been protected, as acting in aid of those who were acting under the magistrate's warrant. Whilst the party is before the magistrate under the warrant, the defendant says that he has another charge against him. That was a part of the proceedings before the magistrate, and was no trespass in the defendant, who merely made an additional charge.

The rest of the Court concurring, the rule was refused.

Rule refused.

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HUME and Others *v.* LIVERSIDGE and Others.

A plea, to a declaration on a bail bond, that no *proper* affidavit of debt was filed, is bad.

DEBT on a bail bond. The declaration averred, that the writ, before the delivery to the plaintiffs, was duly marked and indorsed for bail for 43*l.* 4*s.* 4*d.*, according to the form of the statute in such case made and provided. Plea—*actio. non*; because they say that no proper affidavit of the alleged cause of action of the said plaintiffs against the said *G. Liversidge*, as to the said sum of 43*l.* 4*s.* 4*d.*, was made and filed of record in the said Court before the issuing of the said supposed writ in the said declaration mentioned, according to the form of the statute in such case made and provided; and this &c., wherefore &c. Special demurrer and joinder.

Addison, in support of the demurrer, was stopped by the Court, who called upon—

Erle to support the plea.—It is no more argumentative to say that no proper affidavit was filed, than to say *non debito modo electus* in a return to a *mandamus*. [*Bayley*, B.—I believe the rule is, that, if the writ or pleadings allege that he was properly elected, you may take your issue as large, traversing the *debito modo electus*; but that you cannot say *non debito modo electus*, unless in answer to such an averment (a).] The use of the word *proper* is not assigned as cause of special demurrer. In *Rogers v. Jones* (b), and *Hughes v. Jones* (c), it was held, that an improper affidavit made the arrest void, and that no action for escape lay in such case. [*Bayley*, B.—In those cases there was no authority to administer affidavits in the supposed officers; the affidavits were therefore void, and the case was as if there had been no affidavits.]

(a) *Vide Rex v. Lyme Regis*,
Doug. 79.

(b) 7 B. & C. 86.
(c) 1 B. & Ad. 388.

Lord LYNTHURST, C. B.—The affidavit, consistently with this plea, might either be defective in substance, or there might only be such a defect in it as would enable the party, at an early period after the arrest, to apply to the Court for relief, in the exercise of their discretion.

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BAYLEY, B.—No proper issue can be taken on this plea; if the plaintiff were to say that there was a proper affidavit, the jury would have to judge of the propriety. Suppose that there were some defect in the affidavit to hold to bail, which might entitle you to apply to the Court: can you, after neglecting to do so, set up such defect in a plea to the declaration on the bail bond? The affidavit may be improper, for omitting to state that the money was lent at the defendant's request. A mistake of that nature would render the affidavit improper within the words of this plea.

Judgment for the plaintiff.

BOULTER v. ARNOTT.

ASSUMPSIT for goods sold and delivered. Plea—the general issue. At the trial before *Vaughan*, B., at the last *London* Sittings, the plaintiff was nonsuited for not proving a sufficient delivery, the declaration containing no count for goods bargained and sold. The action was brought to recover the price of a quantity of cigars, which had been bought by the defendant from the plaintiff. No credit was to be given. The cigars were originally to have been left for the defendant at the *One Tun*, in *Jermyn Street*, but, subsequently to the sale, the defendant had desired that the plaintiff should keep them until he called for them. The defendant had found, and sent to the plain-

Goods sold for ready money were packed up in boxes of the vendee for him and in his presence, but remained on the premises of the vendor:—*Held*, that goods sold and delivered would not lie.

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tiff's, boxes in which the cigars had been packed by the plaintiff for the defendant, and in his presence.

Bompas, Serjt., now moved, by leave of the learned Judge, to set aside the nonsuit, and enter a verdict for the price of the cigars. The filling the boxes of the defendant with the cigars was a sufficient delivery. In *Hodgson v. Le Bret* (a), where a purchaser wrote her name on a piece of linen, it was held sufficient. [*Bayley*, B.—Not as a delivery, but as an acceptance, to take the case out of the Statute of Frauds.] So, in *Anderson v. Scot* (b), the marking the plaintiff's initials by the plaintiff, in the defendant's presence, on the casks, was held sufficient. [Lord *Lyndhurst*, C. B.—The vendee there exercised a dominion over the articles, which the Court thought a sufficient acceptance within the Statute of Frauds. *Bayley*, B.—In *Goodall v. Skelton* (c), *A.* agreed to sell goods to *B.*, who paid earnest, and the goods were packed in cloths furnished by *B.*, and deposited in a building belonging to *A.*, until *B.* should send for them; but *A.* declared that they should not be carried away until they were paid for; and it was held, in an action for goods sold and delivered, that there was no delivery. *Vaughan*, B.—In this case they were to be kept by the plaintiff until the defendant called and paid for them, and took them away. Lord *Lyndhurst*, C. B.—If this were a ready-money transaction, the packing clearly could not be intended as a delivery; there was no intention of delivering them until they were paid for.] The boxes could not be opened by the plaintiff without the assent of the defendant. They were the warehouse of the defendant for this purpose. After the boxes were packed the delivery was as complete as if they had been locked up in the defendant's warehouse.

(a) 1 Camp. 233.

(b) Note, *Ibid.*

(c) 2 H. B. 316.

Lord LYNTHURST, C. B.—I am of opinion that this being a ready money transaction, the plaintiff never intended by packing these boxes, which were to remain in his own custody on his own premises, to give up the cigars without receiving payment for them.

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BAYLEY, B.—From first to last these goods remained in the possession of the plaintiff. It is an entirely different question, whether doing an act like marking or packing for the vendee in his presence may not operate as an acceptance by him under the statute of frauds. The question here is, whether there was a delivery to the vendee. I do not agree that the boxes are to be considered as having been the warehouse of the defendant; but I think that the plaintiff was entitled to consider the goods as in his own possession. *Goodall v. Skelton (a)*, is a distinct authority against the plaintiff's recovering in this action.

The rest of the Court concurred, and the rule was refused.

Rule refused.

(a) 2 H. Bl. 316.

CREIGHTON's Bail.

IN this case the notice of bail was a *two* days' notice to put in and justify at the same time. The defendant was a prisoner, but the notice did not state that he was so.

Where the defendant is a prisoner, a notice of putting in and justifying bail at the same time must state that the defendant is a prisoner.

J. Jervis opposed the bail on this ground, and contended, that it was the uniform practice of the Court for it to appear in the notice that the defendant is a prisoner. That the reason was, that the rule for allowance was always drawn up as well for the allowance as the discharge of the

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prisoner, which it would not be, unless it appeared that the defendant was a prisoner.

GURNEY, B., (after referring to the Master), held the objection good; and said, that the common form of the rule for allowance was in the way suggested.

Bail rejected.

LLOYD v. HEATHCOTE.

A bond was given conditioned to secure a London banker from the balance arising from paying bills, &c., &c., for a country banker; a stipulation was inserted in the condition, that the whole amount of monies to be ultimately recoverable should not exceed the sum of 1000*l*.:—*Held*, that the bond did not require a 2*5**l*. stamp.

DEBT on bond.—The condition recited, that the plaintiffs carried on the business of bankers in copartnership; and, for their greater convenience in the said business, had a banking-house at *Manchester*, where their business was conducted and carried on under the firm of *William Jones, Samuel Jones Lloyd, Edward Lloyd & Co.*, and had another banking-house in *London*, where their business was conducted and carried on under the firm of *Jones, Lloyd & Co.*; and, that the defendants, *Michael Heathcote* and *John Heathcote*, had requested the said plaintiffs to draw bills of exchange from *Manchester* on their said house in *London*, for the use and benefit, or on the account of the said defendants, *Michael Heathcote* and *John Heathcote*, and to permit them, the said *Michael Heathcote* and *John Heathcote*, to draw on the said house in *London* of them, the said plaintiffs, all such bills of exchange as they the said *Michael Heathcote* and *John Heathcote* should or might at any time or times thereafter have occasion to draw or cause to be drawn; and also to furnish and supply the said *Michael Heathcote* and *John Heathcote* with, and to lend and advance to them, and to pay on their account from time to time, all such cash, bank notes, bank-post bills, and other negotiable bills of exchange and promissory notes as the said *Michael Heathcote* and *John Heathcote*

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might from time to time require; and also, from time to time, to discount for the use and benefit or on the account of the said *Michael Heathcote* and *John Heathcote*, bills of exchange, promissory notes, and other negotiable securities; and also, to permit and suffer them, the said *Michael Heathcote* and *John Heathcote*, to keep a cash account with them, the plaintiffs, and to be furnished by them with cash for the use, convenience, or accommodation of the said *Michael Heathcote* and *John Heathcote*. And that, for the purpose of securing or in part securing the amount for the time being due or owing, or to become due or owing, from or by the said *Michael Heathcote* and *John Heathcote* to the said plaintiffs, or any one or more of them solely, or to them or any one or more jointly with their or his partners or partner for the time being, for or by reason or means of bills or notes drawn or to be drawn, or to be made or become payable in manner aforesaid, or for or by reason or means of cash, bank notes, bank-post bills, or other bills or notes furnished or supplied, lent or advanced, or paid, or to be furnished or supplied, lent or advanced, or paid in manner aforesaid, or by reason or means of bills or notes or other securities discounted or to be discounted in manner aforesaid, or for or by reason or means of cash advanced or to be advanced on the said cash account, or on any other account whatsoever, or for or on account of any other transactions, dealings, matters or things whatsoever; they, the said *Michael Heathcote* and *John Heathcote*, and the said defendant, *William Heathcote*, as their surety, had agreed to become bound to the said plaintiffs in and by the said obligation, subject to such condition or proviso thereafter written, expressed and declared, (that is to say), that if the said *Michael Heathcote* and *John Heathcote*, or either of them, their or either of their heirs, executors, or administrators, or any of them, did and should from time to time, and at all times thereafter, well and truly pay or remit to the said plaintiffs,

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their executors, administrators, or assigns, cash or good bills of exchange, or other good and sufficient effects to their liking and approbation, sufficient in amount and value to pay and discharge, and in order to pay and discharge, all and every such bill and bills of exchange, promissory note or promissory notes, as should be drawn as well upon or by them, the said plaintiffs, as any one or more of them jointly, or as partners with any other person or persons, or by any one or more or all of the partners for the time being in the said banking concern on account thereof, by or for the use or benefit, or on the account of the said *Michael Heathcote* and *John Heathcote*, or either of them, at or before the time or several times when the same bill or bills of exchange, promissory note or promissory notes should respectively become due, and also sufficient to pay and discharge, and in order to pay and discharge all and every sum or sums of money due or to become due as well to them, the said plaintiffs, or any one or more of them jointly with such partners or partner for the time being as aforesaid, for or by reason or means of all and every the said bills or notes so drawn or to be drawn as aforesaid, or for or by reason or means of cash, bank notes, post bills, and other negotiable bills of exchange and promissory notes so furnished or supplied, lent or advanced, or paid, or to be furnished or supplied, lent or advanced, or paid as aforesaid, or by reason or means of such bills of exchange, promissory notes, or other negotiable securities so discounted or to be discounted as aforesaid, or for or by reason of any monies to be advanced or paid to or on the account of the said *Michael Heathcote* and *John Heathcote*, or either of them, on the said cash account in anywise, or on any other account whatsoever, together with discount, postage of letters, interest, and commission on the same bills, notes, securities, and monies, or for or by reason or means of any dealings, transactions, matters, or things whatsoever, had or to be had, as well between the said plaintiffs or any one

or more of them solely, as between them or any one or more of them jointly with such partners or partner for the time being as aforesaid, and the said *Michael Heathcote* and *John Heathcote*, or either of them, in anywise howsoever. And, if the said *Michael Heathcote* and *John Heathcote*, and each of them, their and each of their heirs, executors, and administrators, and every of them, did and should from time to time when thereunto requested by the said plaintiffs, or any one or more of them, or the executors or administrators of the survivor of them, join with them or any or either of them in stating, settling, and closing a final account and settlement touching and concerning all and every such bill and bills of exchange, promissory note and promissory notes, cash, bank notes, bank-post bills, and other negotiable securities as aforesaid, and of and concerning every such furnishings, supplyings, advances, loans, payments, discounting, cash transactions, and all other transactions, dealings, matters, and things as aforesaid; and also did and should well and truly pay unto them the said plaintiffs, their executors, administrators, or assigns, all and every such sum and sums of money whatsoever as should upon the settling of such accounts be due or owing as well to them, the said plaintiffs, or any one or more of them solely, or to their or any of their executors, administrators, or assigns, as to them or any one or more of them jointly with such partners or partner for the time being as aforesaid, or to the executors, administrators, or assigns of them, the said plaintiffs, and such partner or partners as aforesaid, or any of them, when and as the same should respectively become due, for the purpose of duly paying and satisfying the same, then the said obligation should be void, otherwise to be or remain in full force and virtue. And it was by the said consideration provided always, and it was thereby declared to be the true intent and meaning of the said writing obligatory, *that the whole*

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amount of monies to be ultimately recoverable by virtue of the said obligation should not exceed the sum of 1000l.

The defendant pleaded (*inter alia*) *non est factum*.

At the trial, before *Bolland, B.*, at the *London Sittings* after last *Trinity Term*, it was objected that this bond should have had a *25l.* stamp. The learned Baron overruled the objection, but gave the defendant leave to move to enter a nonsuit.

Kelly now moved accordingly.—This instrument required a *25l.* stamp. It was in evidence that sums exceeding 1000*l.* had been advanced and paid under this bond. Although the sum to be recovered upon it is limited, yet it is uncertain and without limit, for it is given to recover several successive sums: it is intended to secure many repeated advances, which might include hundreds of thousands of pounds.

In *Scott v. Alsopp* (a), it was held, in an action on a bond conditioned for securing indefinite advances, that the sum ultimately recoverable was not limited by the penalty of the bond so as to dispense with the larger stamp. In that case Mr. Baron *Wood* seems to have had such a case as the present in his mind, for he says—"It is said, that if the limitation had been expressed in the condition, that would have taken it out of the class of bonds subject to the largest duty; but, I should have doubted whether it would not then have been liable to that duty if it had been given to secure a final balance on account current." [*Bayley, B.*—That was with reference to what had been thrown out by the Lord Chief Baron, who had said—"Now, I cannot but consider the words of the act, where the money secured, or to be ultimately recoverable, 'shall be' limited not to exceed a given sum, as contemplating an express

(a) 2 Price, 20.

limitation to be provided by the condition of the bond." In the present case the condition adopts the very words of the legislature, that the sum ultimately recoverable shall not exceed 1000*l*.] It adopts one part of the words of the legislature only (a). The words are, "where the money secured, or to be ultimately recoverable, shall be limited not to exceed a certain sum." Where both those occur, the duty, as on a bond for such limited sum, is sufficient; but here, though the sum ultimately recoverable was limited not to exceed 1000*l*., yet the sum secured was not so limited; but the bond was a security for the many thousands that from time to time should become due.

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Rule *nisi* granted.

Coltman and *W. H. Watson* now shewed cause.—The objection is founded on the dictum of *Wood, B.*, in *Scott v. Alsopp* (b). In that case, however, there was no limitation in the condition of the bond as to the amount to be recovered; and, therefore, it was argued, that the penalty was a limitation of the amount to be recovered, within the meaning of the words of the act. The Court, however, held, that the condition, and not the penalty, is to be looked at for the purpose of seeing whether there is any limitation, or otherwise the statute could never apply to a bond with a penalty. In the present case, however, the condition adopts the very words of the Stamp Act, and provides that the sum ultimately recoverable shall not exceed 1000*l*. Mr. Baron *Wood's* dictum only amounted to a doubt, and the contrary opinion has prevailed. In *Williams v. Rawlinson* (c), it was held, that a bond conditioned to indemnify and save harmless the obligees for such sum as they, in their banking business, should within ten years advance or pay, or be liable to advance or pay, for or on account of their accepting, discounting, &c., any bill of exchange,

(a) 55 Geo. 3, c. 184.

(b) 2 Price, 20.

(c) R. & M. 233.

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notes, &c., which *A. B.* should, from time to time, draw upon or make payable &c., at their house; and also other sums which they, within the period aforesaid, should otherwise lay out, pay, &c., on the credit of the said *A. B.*, or on his account; and also all such wages and allowances for advancing, paying, &c., such bills &c., advances, payments, engagements, and accommodations, *not exceeding the sum of 5000*l.* in the whole*, together with interest on such advances, did not require a 25*l.* stamp. The Lord Chief Justice of the *Common Pleas* said in that case, at *Nisi Prius*,—
“ Upon the second point the case is equally clear. The sum to be recovered on this bond is limited to 5000*l.*, and that brings it immediately within the words of the Stamp Act.”

The case subsequently was brought before the Court of *Common Pleas*, and a rule was moved for, amongst other grounds, on the very point now attempted to be raised in this case, namely, that if the bond “ were intended to secure successive advances of 5000*l.* each to an unlimited extent, it ought to have had a 25*l.* stamp.” The Court, however, said, that “ there was nothing in the objection,” and refused to grant a rule on that point.

In the recent case of *Dickson v. Cass* (b), though there was a limitation that the sum should not exceed 1000*l.*, yet that limitation did not extend to the banker's charges for commission, &c., and upon that ground the Court of *King's Bench* held, that the 5*l.* stamp was not sufficient. In that case, however, it was never suggested as a tenable point, that the bond, being for a floating balance, required on that ground a 25*l.* stamp, though the objection arose in that case as well as in the present.

Kelly, in support of the rule.—The words of the statute are in the alternative. On the construction contended for on behalf of the plaintiffs, the word *or* must be read *and*.

(a) 3 Bing. 71.

(b) 1 B. & Ad. 343.

[*Bayley*, B.—What is the total amount of the money secured? Is more secured than is ultimately recoverable?]

Yes. The balances from time to time are secured. There are two classes of cases; one, where, as in the case of *Mason v. Pritchard* (a), the surety is discharged by the payment of the first sum; and the other, where the engagement of the surety is held to be continuing. The legislature may have intended to make a difference between persons having a security, which will be discharged after payment of one sum, and persons who hold a security for a floating balance, which will cover the balances arising from time to time, and will be in effect a security for many times the sum expressed in the limitation. [*Bayley*, B.—On the principle upon which the stamp laws are construed, the legislature should have shewn their intention in plainer language, if it was intended to charge the subject in the manner contended for.]

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BAYLEY, B.—This seems to me a very plain case. After the enactment as to definitive sums comes this provision, “where the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain and without any limit, 25*l*.;” and then comes the provision where the money secured, or to be ultimately recoverable thereupon, shall be limited not to exceed a given sum, the same duty as on a bond for such limited sum.

Now, what is meant by the money secured, or to be ultimately recoverable thereupon? It seems to me that the words are synonymous; and, that the legislature in two modes has expressed substantially the same thing. But, even if the expression were equivalent, we cannot hold that the charge is binding on the subject, unless the act speaks plainly.

Now, here the bond is in express terms calculated to

(a) 12 East, 227.

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meet the act of Parliament; for it says, that the whole amount of monies to be ultimately recoverable by virtue of the said obligation shall not exceed the sum of 1000*l*. This is, then, a bond where the money secured and ultimately recoverable does not exceed 1000*l*. The words "to be ultimately recoverable," seem to me calculated to meet the case of a floating balance secured by a bond, which can be recovered once, and once only.

VAUGHAN, B.—I am of the same opinion. The bond appears to me to have been drawn with peculiar attention. The sum is limited to 1000*l*., and it is impossible to hold that more than that sum has been secured or is ultimately recoverable thereupon. I am, therefore, clearly of opinion, that 5*l*. is the proper duty.

BOLLAND, B.—I cannot entertain a doubt. The first set of duties is on fixed sums. The act then proceeds to provide, that when the amount is uncertain, as in the case of a floating balance, a duty of 25*l*. shall be paid; and then enacts, that where the money secured or ultimately to be recoverable shall be limited not to exceed a given sum, the same duty as on such sum shall be paid. I think the expressions used are synonymous; but, at all events, there is no difference applicable to the present case, as the 1000*l*. is the sum secured and ultimately recoverable. A limited sum was reserved by the condition, and on that sum the duty was to be paid.

GURNEY, B., concurred.

Rule discharged.

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DONALDSON *v.* WILLIAMS.

TRESPASS.—The first count of the declaration was for an assault and false imprisonment, and compelling the plaintiff to go from and out of a certain dwelling-house into a certain public street, and along divers public streets, to a certain public police-office, and then and there imprisoning and detaining him.

The second count was for a common assault.

Pleas—*First*, Not guilty. *Secondly*, as to the first count, that the plaintiff before the said time when &c., in the first count mentioned, to wit, on &c., was a weekly hired servant of the defendant and one *Alexander Whyte*, and employed by them as such weekly servant in their joint trade and business of hatters, which was then and continually afterwards, and at the said time when &c., carried on in the said dwelling-house in the said first count mentioned, the same being the dwelling-house of the said defendant and the said *Alexander Whyte*, and wherein the said plaintiff lodged and resided as such weekly servant as aforesaid. And because the said plaintiff afterwards, to wit, on &c., and on divers other days and times between that day and the said 5th day of *May*, in the year aforesaid, and whilst he was and continued such servant as aforesaid, to wit, in the county aforesaid had refused to obey the lawful commands of the said defendant in the trade and business aforesaid, and had behaved and conducted himself saucily and contumaciously towards the said defendant, his said master, and had violently abused, insulted, and threatened him the said defendant, and thereby greatly interrupted and hindered the said defendant in conducting and carrying on the said trade and business at the said dwelling-house; the said defendant before the said time when &c., to wit, on the 28th *April*, in the year aforesaid, in the county aforesaid, gave the said plaintiff notice and warning

One of two partners, joint tenants of a house where their joint business is carried on, has a right to authorize a joint weekly servant to remain in the house, though the other partner has regularly given him a week's notice to leave the service.

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to leave the said service of the said defendant and the said *Alexander Whyte*, and to quit the said dwelling-house in the said first count mentioned, on *Saturday*, the 5th day of *May*, in the year aforesaid, to wit, in the county aforesaid. And that afterwards, and just before the said time when &c., to wit, on *Saturday*, the said 5th day of *May*, in the year aforesaid, the said plaintiff was requested by the said defendant to leave the service of the said defendant and the said *Alexander Whyte*, and to quit the said dwelling-house according to such notice and warning as aforesaid, to wit, in the county aforesaid; but the said plaintiff then and there wholly refused so to do, and insisted and threatened the said defendant that he would remain and continue therein; wherefore the said defendant, in order to turn the said plaintiff out of the said dwelling-house at the said time when &c., assaulted the said plaintiff, by seizing and laying hold of him, and necessarily and unavoidably a little pulled and dragged him about; but the said plaintiff then and there violently resisted, and with force and arms made a great noise and disturbance in the said dwelling-house, and continued therein making such noise and disturbance, and had thereby caused a great number of persons to enter into the said dwelling-house in which &c., and to collect and assemble about the door thereof, inso-much that the said defendant was greatly interrupted, and wholly hindered and prevented from peaceably and quietly exercising and carrying on his said trade and business therein, whereupon the said defendant, in order to preserve the peace and restore good order and tranquillity in the said dwelling-house in which &c., at the time when &c., in the said first count mentioned, caused the said plaintiff to be seized and laid hold of, and forced and compelled him to go from and out of the said dwelling-house in which &c., into a certain public street, and to go in and along the said public streets to the said police-office in the said first count mentioned, in order that the said plaintiff

might be taken before some justice or justices of our said lord the King, assigned to keep the peace in and for the county of *Middlesex*, to answer the premises, and to be dealt with according to law for his said offence and breach of the peace, to wit, in the county aforesaid, using no unnecessary force or violence upon or towards the said plaintiff on that occasion; and the said plaintiff was, on the occasion aforesaid, necessarily and unavoidably assaulted and imprisoned, and kept and detained in prison for the said space of time in the introductory part of this plea mentioned, as he lawfully might for the cause aforesaid, which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above thereof complained against him the said defendant. And this &c.

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The *third* plea was nearly similar to the second, justifying the assault mentioned in the second count.

Replication to the second plea.—That after the giving of the said notice in that plea mentioned, and before and at the said time when &c., to wit, on the said 5th *May*, 1832, the said *Alexander Whyte* commanded and authorized the said plaintiff to be, remain, and continue in the said dwelling-house in which &c., then being the dwelling-house of the said defendant and the said *Alexander Whyte*, and that the said plaintiff, at the said time when &c., was remaining and continuing in the said dwelling-house in which &c., then being the dwelling-house of the said defendant and the said *Alexander Whyte*, by the command and authority of the said *Alexander Whyte*, as he lawfully might, whereof the said defendant before and at the said time when &c., had notice; wherefore, because the said defendant did then and there assault the said plaintiff, as in the same plea mentioned, he, the said plaintiff, did then a little resist the said defendant, and in so doing did then and there necessarily make a little noise and disturbance in the said dwelling-house, as it was lawful for him to do.

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A similar replication to the third plea.

Rejoinder—taking issues on these replications.

At the trial, at the Sittings in this Term, the plaintiff obtained a verdict, with 40*s.* damages.

Holt now moved for judgment, *non obstante veredicto*, or, that a repleader might be awarded; and contended, that the issue tendered by the replication was an immaterial issue; that the plaintiff having refused to obey the lawful commands of his master, the defendant, and he having given him due notice to quit his service, the plaintiff ought to have quitted accordingly, and had no right to refuse to leave the defendant's dwelling-house, and, therefore, that the defendant was justified in committing the trespasses complained of; and it was no answer to say, that the other partner had authorized him to remain, as one partner had no authority to do so where the servant had refused to obey the lawful commands of the other; and, therefore, that the issue was immaterial.

LORD LYNTHURST, C. B.—As the partners are jointly interested in the house, has not either of them a right to retain a servant in the house? Are not their rights coextensive? I am of opinion, that in this case one joint tenant had a right to order the servant to remain; and, if he remained under the authority of one joint tenant, such remaining was lawful.

The rest of the Court concurred, and the rule was—

Refused.

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DEACON v. FULLER.

IN *Hilary* Term, 1829, the plaintiff obtained a rule absolute for setting aside the verdict found for the defendant and for a new trial, but no proceedings had been since taken, except that on the 10th of *December* last an order, by consent, had been obtained to change the defendant's attorney. On an affidavit, stating these facts,

When the plaintiff has obtained a rule for a new trial, but neglected to take the cause down to trial for more than four terms, it is necessary to give a term's notice of motion to discharge such rule.

The obtaining an order, by consent, to change the attorney, is not a proceeding in the cause so as to make it unnecessary to give such notice.

Mansel now moved to discharge the rule for a new trial, and contended, on the authority of *Roe d. Hutchings v. Dunning* (a), that a term's notice of motion was not necessary. He also cited *Theobald v. Crickmore* (b), and *Hockin v. Reece* (c), and urged that the Court of *Common Pleas*, in *Tipton v. Meeke* (d), had admitted the principle that such a motion as the present might be made. [*Bayley, B.*—The case of *Tipton v. Meeke* has decided, that when a new trial has been granted, and four terms have since elapsed and no proceedings taken, a term's notice is necessary.] He then contended that the order, by consent, to change the attorney was a proceeding in the cause, so as to make it unnecessary to give a term's notice.

BAYLEY, B.—I think not. I think, upon principle, the motion ought not to be granted, the party having another mode by which he can proceed. The Court has granted a rule for a new trial. Either party may take down the record.

Rule refused.

(a) *Barnes*, 308.

(b) 2 B. & A. 594; 1 Chit. Rep.

317.

(c) 2 *Yo. & J.* 275.

(d) 8 *B. Moore*, 579.

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COOK v. ALLEN.

In this Court the plaintiff has four terms to file common bail for the defendant, *sec. stat.*

A defendant is not entitled to an imparlance unless he appears.

J. JERVIS had obtained a rule to shew cause why the judgment and execution should not be set aside for irregularity. The *quo minus* was served on the 1st of *June*, returnable on the 2nd of *June*. Some negotiations for a compromise had been pending, and the plaintiff did not take any proceedings until the second day of *Michaelmas* Term, when he filed common bail according to the statute. The declaration was filed, and notice thereof served, on the 20th of *November*, and a rule to plead in eight days was given on the 22nd of *November*. On the 1st of *December*, interlocutory judgment was signed. Notice of taxation was duly given—final judgment was signed—and a writ of execution issued on the 13th of *December*. On the 17th of *December*, a summons was taken out to set aside proceedings; but Mr. Baron *Bolland* considered it a proper case for the Court, and refused to make an order. The rule was obtained on two grounds. *First*, that common bail was not filed in due time. *Secondly*, that the defendant was entitled to an imparlance to *Hilary* Term; and, therefore, the judgment was irregular.

W. H. Watson shewed cause.—As to the first point, he contended—*First*, that the application was too late: the motion should have been made either to the Court, or to a Judge at Chambers, before judgment was signed. The defendant was bound to move promptly after the plaintiff had declared, as that was a step taken after the irregularity. [The Court intimated, that the application was too late, unless the defendant could assign some reason for the delay.] *Secondly*, the stat. 12 Geo. 1, c. 29, which allows the plaintiff to file common bail for a defendant, contains no restriction as to the time in which the plaintiff is to file common

bail. The case of *Bugden v. Burr* (a), is merely the practice of the *King's Bench*; but, the practice in this Court always has been, that the plaintiff may file common bail for the defendant at any time before the cause is out of Court, viz. within four terms. What is laid down as the practice in *Price's Exchequer Practice*, is founded on the rules of the *King's Bench* and *Common Pleas*, but is not correct. As to the second point, he contended, that the defendant never was entitled to an imparlance unless he appeared; and he cited *Winter v. Barnes* (b). [*Bayley, B.*—He cannot imparl, for the plaintiff has not made default.]

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J. Jervis abandoned the second point, and contended, that the case of *Bugden v. Burr* was conclusive on the first point, as it was most important to assimilate the practice of all the Courts, and as there was no express decision on the point in this Court.

LORD LYNTHURST, C. B. (after consulting the Master).—The Master reports to us, that the practice of this Court is, that a plaintiff may file common bail for the defendant within four terms. Whether it may be advisable or not to introduce into this Court the practice of the *King's Bench* in this respect, is a matter for consideration; but, the practice here is, as reported by the Master.

The other Judges concurred.

Rule discharged, with costs.

(a) 10 B. & C. 457.

(b) 9 Dowl. & Ryl. 18.

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WOOSNAM *v.* PRICE.

An order obtained from a Judge's clerk by mistatement, is a nullity.

After a bail bond has been forfeited and an assignment thereof taken, time given to the principal is no discharge of the sureties.

THE plaintiff had commenced a bailable action of debt in this Court against the defendant, *Price*, for principal and interest due on a bond, and also for business done by him as an attorney in an action at law. The *quo minus* on which the defendant had been arrested, and had given a bail-bond, was returnable on the 2nd of *June* last. On the 3rd, the defendant's attorney took out a summons, calling on the plaintiff to shew cause why the bill for business should not be referred to the Master for taxation. An order was made thereupon and served on the plaintiff, the defendant thereby undertaking to pay the amount in a fortnight after taxation. A dispute arose between the clerks of the respective attornies, whether or not this order operated as a stay of proceedings. On the 10th of *June*, the clerk of the defendant's attorney went to the Chambers of Mr. Baron *Bayley*, and representing to the learned Baron's clerk that the learned Judge had in fact (which was sworn to be untrue,) ordered that proceedings should be stayed, obtained another order for taxing the bill, containing a stay of proceedings. On the same day, bail above not having been put in, the plaintiff took an assignment of the bail-bond, and commenced an action thereon. An appointment for taxing the plaintiff's bill was given on the *first* order, and attended by the defendant's attorney. On attending the Master, the bill was agreed to be referred to the officer of the Great Sessions in *Wales*. On the 1st *August*, the plaintiff and defendant, *Price*, met, and it was agreed between them, without the privity, knowledge, or consent of the bail in the bail-bond, that, in consideration that the plaintiff would not proceed in an ejectment between the same parties, and would stay proceedings in the action for a month, the defendant, *Price*, would not tax his bill of costs. A rule had been obtained for setting aside

the assignment of the bail-bond and all proceedings thereon, for irregularity, and also on the ground that the bail were discharged by the time given to the principal.

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W. H. Watson shewed cause.—The proceedings were not stayed either by the first or second order. The first contains no stay of proceedings, and the second order was a nullity, having been surreptitiously obtained. It is clear, that, as the action was on a bond as well as for an attorney's bill, pending the taxation a Judge would not have stayed the proceedings. Moreover, the parties treated the second order as a nullity, as the appointment was on the first order; and, therefore, as the proceedings were not stayed, the assignment of the bail-bond and proceedings thereon were regular. As to the second ground, the defendant not having appeared, the bail-bond was forfeited, and the original cause out of Court, before the agreement was made, therefore, it was merely delaying suit against the sureties at the instance of the principal; and, in order to make this a ground for setting aside proceedings, it must be shewn, or the Court must intend, that the bail have been prejudiced, which is not the case, for the bail could not render the principal, or take any steps to exonerate themselves, in the long vacation. In *Farmer v. Thorley* (a) it was held, that bail to the sheriff is discharged by the plaintiff's taking a *cognovit*, payable by instalments; but that was because a *cognovit* is inconsistent with a forfeiture of the bail-bond, as a defendant can only acknowledge the action when in Court. In the present case the bond was forfeited, and a breach incurred before the agreement was made, and there has been no prejudice to the bail. [*Bayley, B.*—May not the bail be prejudiced by not having the bill taxed?] They are at liberty to tax it after judgment in the action on the bail-bond.

(a) 4 B. & A. 91.

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Jervis and Knowles, contra.—The first order operated virtually as a stay of proceedings; it is not in the common form, but contains an undertaking to pay in a fortnight after taxation, during which time it must be implied that the plaintiff's remedies should cease. [Lord *Lyndhurst*, C. B.—It is impossible to argue that the proceedings can be stayed by implication in this case]. The second order was a valid order. [*Bayley*, B.—That order is a nullity, as it was improperly obtained.] On the second point, time was given to the principal without the privity or consent of the bail, by which they are discharged. A month's time was given, during all which time they were prevented from relieving themselves from their liability. At all events before proceedings were adopted, after the expiration of the month, notice should have been given to the bail. *Clift v. Gye* (a).

LORD LYNDHURST, C. B.—The second order was a nullity, and the first did not operate to stay proceedings; and, therefore, the proceedings on the bail-bond are regular; and, as it cannot be shewn that the bail have been prejudiced, the agreement does not discharge them.

BAYLEY, B.—There was a breach of the condition of the bail-bond before the agreement, and that breach is not done away by the agreement; the bail have not been in anywise prejudiced. But, as the Court disapproves of agreements not to tax an attorney's bill, the rule must be discharged without costs.

The other Judges concurred.

Rule discharged, without costs.

(a) 9 B. & Cr. 422.

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CRUMP v. ADNEY and PAGE.

ASSUMPSIT.—The first count of the declaration stated, that theretofore, to wit, on the 30th *March*, 1831, in the county of *Salop*, by a certain agreement in writing then and there made between the plaintiff of the one part, and the defendants of the other part, reciting that *Edward Crump*, then deceased, being a widower, made and duly executed his last will and testament in writing, bearing date on or about the 8th day of *November*, 1828, and thereby appointed the said *John Adney*, his son-in-law, and *Thomas Onions*, joint executors. And further reciting, that the said *Edward Crump*, being still a widower, on or about the 16th *July*, 1829, intermarried with the plaintiff; and, that the said *Edward Crump*, on or about the 20th *January*, 1830, being then in a weak state of body, gave, as it was alleged, instructions to *William Fifeild*, his medical attendant, to procure a codicil to be made to his, the said *Edward Crump's*, will, in favour of his said wife; and that the said *William Fifeild*, on the ——— day of the same month of *January*, attended at the office of Messrs. *Pritchard & Sons*, solicitors, and requested them to prepare such codicil; which, for reasons then given to the said *William Fifeild*, they declined; and that the said *William Fifeild* afterwards, on the 30th of the same month of *January*, waited upon *Thomas Gitton*, solicitor, and gave him several verbal instructions for such intended codicil, which instructions were then, at the request of the said *William Fifeild*, taken down in writing by the said *Thomas Gitton*; and that the same instructions were as in the said agreement in that behalf mentioned and set forth. And further reciting, that the said *Edward Crump* died on or about the 14th *February*, 1830, without having executed such instructions for a codicil, or the same having been otherwise reduced into any other form for that purpose;

In an agreement of reference it was agreed that the arbitrator "shall or may" award a certain matter, with a proviso, &c. &c.:—*Held*, that the words "shall or may" were imperative on the arbitrator, and that he was bound to insert the proviso in his award, the context of the agreement and the situation of the parties requiring such a construction.

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and that the plaintiff had entered a *caveat* against the proof of the will, unless the paper of instructions was proved therewith, and that disputes had arisen between the parties relative thereto. And further, that the said *John Adney* and his family, and the said *Thomas Page*, being materially interested in the said will of the said *Edward Crump*, had agreed with the plaintiff to purchase in the public funds such annuity, (if any such should be awarded), for her life, or else in the joint names of trustees to be appointed by the thereafter named *Charles Blake Allnutt*, such a sum of *3l. per cent.* Consols, as would produce from the dividends such annuity as should be settled and fixed by the said *Charles Blake Allnutt*, upon due consideration of the facts aforesaid, and of such other facts and circumstances as might be adduced and proved before him, as could entitle the plaintiff to any such annuity, or otherwise to any share or thirds of the personal estate of the said *Edward Crump*, deceased, and of the charges of establishing the said paper of instructions, as far as the personal estate was or might be affected thereby; and of the said paper being imperative, as far as the real and personal estate was included therein, or otherwise howsoever; and of the advantage which the said parties mutually had in avoiding legal proceedings, and in saving the expenses thereof; and all proper abatement and allowances being made in respect thereof, such annuity, if any such should be awarded, to be in lieu of every provision intended the plaintiff by the said paper of instructions, and in lieu of all thirds at common law to which the plaintiff might otherwise be entitled out of the personal estate aforesaid, but in nowise to affect her claims to dower out of the real estates late of the said *Edward Crump*, and to be paid and made good by the defendants as aforesaid, to the plaintiff, from the day of the death of the said *Edward Crump* until the actual purchase of such annuity; and, in case the said *Charles Blake Allnutt* should by his award direct the dividends only of the

money to be invested to be paid to the plaintiff, that then, upon the death of the plaintiff, the said stock, funds, and principal money, to go and belong to and to be transferred by the said trustees to the defendants as aforesaid, their executors, &c. It was thereby witnessed, that, for the purpose of carrying the intention of the said parties into execution, each of them, the plaintiff and the defendants, did thereby promise and agree to and with the other of them, that the plaintiff and the defendants, and their respective executors and administrators, should and would on their respective parts and behalfs, well and truly stand to, obey, abide, perform, fulfil, and keep, the award, arbitrament, final end, and determination, of *Charles Blake Allnatt*, of *Shrewsbury*, barrister-at-law, arbitrator, chosen by and between the said parties to award, arbitrate, and determine concerning the matters aforesaid, so as such award should be made, &c. &c. And it was also then and there further agreed in writing, by and between the plaintiff and the defendants, that, *in case the said arbitrator should award any such annuity as aforesaid, he should or might award the same, with a proviso, that, in case of a deficiency of assets of the said testator, the annuity, or the fund from which the same should arise, should abate in the same manner as if it were a provision contained in the said will.* The declaration then set out mutual promises, and then stated, that afterwards, to wit, on &c., at &c., the said *Charles Blake Allnatt*, having taken on himself the burthen of the said arbitrament, upon due consideration *of the facts aforesaid, and of such other facts and circumstances as were adduced and proved before him*, duly made his award in writing under his hand, of and concerning the premises, ready to be delivered to the said parties, or such of them as should require the same, and did thereby then and there award, order, and direct, that the defendants should forthwith purchase, or cause to be purchased in the public funds, in the name of the plaintiff, an annuity of 22*l.* sterling, to

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be payable to her during her natural life, and which should be in lieu of all provisions and thirds mentioned in that behalf in the said agreement, but in nowise to affect her said claim to dower; and he did thereby then and there further award, order, and direct, that the defendants should pay and make good to the plaintiff an annuity of the amount aforesaid, from the day of the death of the said *Edward Crump*, until the actual purchase of the said annuity, in manner aforesaid; and, that he had settled and fixed the costs and charges incurred by the plaintiff in or respecting the entering of the said *caveat* and the proceedings connected therewith, and other matters relative thereto, at the sum of 40*l.* 0*s.* 4*d.*; and did thereby then and there award, order, and direct, that the same sum, and also the costs and charges incurred by the defendants in or respecting the said *caveat*, proceedings, and other matters, should be respectively paid by the defendants. And he did thereby further order and direct, that the costs of that his award, amounting to the sum of 22*l.* 14*s.* 6*d.*, should be in the first instance paid to him by the plaintiff, and that one moiety thereof should be repaid to her on demand by the defendants; and that the several parties should bear and pay their own further costs of that reference. And he did, lastly, thereby then and there award, order, and direct, that, on the purchase of such annuity and payment of such costs as aforesaid, the plaintiff should, if thereto required, execute unto the said defendants, at their costs and charges, a release of all claims and demands at law and in equity, upon or in respect of the personal estate and effects of the said *Edward Crump*: Of which said award the defendants afterwards, to wit, on the day and year last aforesaid, in the county aforesaid, had notice. Breaches—in not purchasing the annuity according to the award—in not making good the annuity from the day of the death of the said *Edward Crump*—in non-payment of the costs respecting the entering of the *caveat*—and in non-payment

of a moiety of the costs of the reference as directed by the award. Exch. of Pleas,
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The second was an *indebitatus* count on an award; with the usual money counts and account stated.

Pleas—*First, Non assumpsit.*

Secondly, As to the first count, and so much of the second as related to the sum of money therein alleged to be due and owing to the said plaintiff upon and by virtue of the said award in that count mentioned—That there were not any facts or circumstances adduced or proved before the arbitrator, other than the facts and circumstances in the said agreement in the said declaration mentioned and set forth.

Thirdly, As to the same causes of action—That it was proved in evidence before the arbitrator, that there were not any assets of the testator whereby or wherewith the said defendants could or were enabled to purchase the said annuity in the said award mentioned, and thereby directed to be purchased as aforesaid, or any part thereof, or whereby or wherewith they could pay or make good to the plaintiff an annuity of the amount in the said award mentioned, or of any other amount whatsoever, from the day of the death of the said *Edward Crump*, or from any other time.

Fourthly, As to the same causes of action—That at the time of the death of the said *Edward Crump*, the said defendants had not, nor at any time since have they had, nor have they now, any assets of the testator, whereby or wherewith they could or might or now can purchase the said annuity in the said award mentioned, and thereby directed to be purchased as aforesaid, or any part thereof, or whereby or wherewith they could pay or make good to the said plaintiff an annuity of the amount in the said award mentioned, or of any other amount whatsoever, from the day of the death of the said *Edward Crump*, or from any other time.

Fifthly, As to the same causes of action—That, at the several times of making the submission and award, the said

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defendants had not, nor at any time since have they had, nor have they now, any assets of the said testator whereby &c., as in the last plea.

Replication—Taking issue on the plea of *non assumpsit*, and a general demurrer to all the other pleas.

Joinder in demurrer.

The cause went down to trial on the issue taken on the plea of *non assumpsit*; and, at the trial, before *Gurney*, B., at the last Summer Assizes at *Shrewsbury*, the defendants offered evidence to prove that there were no assets out of which they could pay or make good an annuity of the amount awarded. The learned Baron rejected this evidence; and the plaintiff had a verdict.

Ludlow, Serjt., obtained a rule for a new trial; against which,

Whateley and *Talfourd* now shewed cause.—The learned Judge was right in rejecting the evidence in question. An award, regularly made, operates conclusively as a judgment between the parties; and, since the arbitrator has awarded the annuity, and other subjects of this action, it is immaterial whether there were assets or not. [Lord *Lyndhurst*, C. B.—Was the arbitrator to find the question of assets?] He was to ascertain on due consideration of the facts stated in the agreement, and of such other facts as should be adduced and proved before him, what was the amount of the annuity to which the plaintiff was entitled; and he could not do so without ascertaining the amount of the assets. [Lord *Lyndhurst*, C. B.—The arbitrator was to decide whether the bequest was valid; and then another point would arise, because there might be a deficiency of assets; and the arbitrator is empowered to make a provision against such event. He is not directed to decide the question of assets, but he is empowered to direct that the annuity should abate in case there should be a deficiency

of assets. It was imperative upon the arbitrator, according to my interpretation, to have inserted that proviso.] That is a question on the award. [Lord *Lyndhurst*, C. B.—No. That is a question, as it seems to me, on the agreement.] The arbitrator is empowered by the agreement to award such annuity as he shall deem fit; and the proviso is, that, in case the said arbitrator should award any such annuity as aforesaid, he *should or might* award the same, with a proviso, that, in case of a deficiency of assets, the annuity should abate. That is merely a discretionary power. It was a question for him to consider, whether it was just and reasonable to award the annuity. He has awarded the annuity to be paid at all events. It must, therefore, be assumed, that the arbitrator knew the facts, and found sufficient assets. [Lord *Lyndhurst*, C. B.—He had no instructions to inquire whether there were assets. *Bayley*, B.—Then, you would put the legatee in a better situation than creditors. At the period of time at which the award was made, there might be 1000*l.* assets, and afterwards 2000*l.* bond creditors might come in and claim.] Before the clause as to the proviso, full power is first given to award the annuity. [Lord *Lyndhurst*, C. B.—According to the construction contended for, the words “shall and may” would be at variance with each other.]

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Jervis, *Ludlow*, Serjt., and *Godson*, *contra*, were stopped by the Court.

LORD LYNDBURST, C. B.—We must endeavour to construe the words, so that “shall and may” may both stand. “Shall and may” will both stand, by our holding them to be imperative; and, had the proviso been inserted in the award, evidence might have been admitted to shew whether there were assets or not. The defendants ought not to be in a worse situation on account of the omission. If the

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proviso were in the award, then the evidence would clearly have been admissible.

Whateley.—Then the question arises, whether it was competent to the defendants to give the facts in evidence under the general issue.

Lord LYNDBURST, C. B.—You are endeavouring to enforce an award on a submission by simple contract. Every thing is admissible under the general issue which shews that the plaintiff does not make out a right to recover. Now, here the defendants shew that they are not to pay in the event of a deficiency of assets.

The rest of the Court concurred, and the rule was made—

Absolute.

Upon a subsequent day, the demurrer to the special pleas came on to be argued.

Where a plea professes to answer the whole of a count or counts, and is no answer to any good part of such count or counts, the plaintiff is entitled to judgment.

Talfourd, in support of the demurrer.—The special pleas purport to answer the first and second counts. Now, the second count is in *indebitatus assumpsit* on an award generally, not shewing it to have any connection with the submission in the first count. It may be on a parol award. The pleas, therefore, are not applicable to all which they profess to answer; and, being bad in part, are bad in the whole. [*Bayley*, B.—Is it quite clear that *indebitatus assumpsit* will lie on an award?] The part of the first count which relates to the costs and expenses, is good, and is unanswered by these pleas. An award may be good in part, and bad in part; so that, at all events, without considering the question suggested as to the second count,

there is a good part of the declaration which is unanswered by these pleas, and which they profess to answer.

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The Court being of this opinion—

Godson, for the defendants, obtained leave to amend, upon payment of costs.

KING v. SKEFFINGTON, Bart.

THE writ of summons in this case was in “an action of trespass on the case upon promises.” The notice of declaration in “an action of trespass on the case.” *Law* obtained a rule for setting aside the proceedings for irregularity, on the ground that the notice of declaration varied from the writ of summons; and that the writ of summons did not pursue the form, No. 1, in the Schedule to the 2 *Will. 4*, c. 39, the words there being “in an action on promises.”

If the notice of declaration be for a different cause of action from that stated in the writ of summons, it is irregular.

In *assumpsit* the writ of summons must follow the form No. 1, in the schedule to the 2 *Will. 4*, c. 39. If it do not, it is irregular.

Hutchinson shewed cause.—The irregularity here complained of is, that the notice of declaration varied from the writ of summons; the writ being in “an action of trespass on the case upon promises,” and the notice of declaration in “trespass on the case.” But it is not necessary to declare according to the form used in the act. The words are, “in an action on promises (or as the case may be).” The act only used these words to fill up the form; meaning only that the party should state the kind of action that was intended to be brought. [*Bayley, B.*—The act says, in an action on promises, (or, *as the case may be*). The writ here is in an action of “trespass on the case upon pro-

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mises." The notice of declaration is "trespass on the case;" that may be on promises or not. If it should not be an action on promises, then you do not specify the true cause of action, as the act requires.] But, if the notice of declaration be irregular, that would not make the writ irregular. The act of parliament does not require it to be shewn whether the action is brought on a note, or simple contract for goods sold, or what else. There is no form of words used for the other actions of debt, trespass, or any other action than *assumpsit*. It requires only the genus and not the species of action to be set forth.

BAYLEY, B.—The act of parliament has stated in specific terms, that the writ shall be in a given form; that form, as applicable to the action of *assumpsit*, is, in "an action on promises." It seems to me better to adhere to the strict form.

VAUGHAN, B.—I am of opinion that it is necessary to adhere to the strict form.

GURNEY, B.—It is not desirable to deviate from the form laid down, otherwise the Court would be always discussing what deviation was allowable.

Rule absolute.

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DEWHIRST v. PEARSON.

DEBT for penalties against the defendant, a sheriff's officer, *first*, for carrying the plaintiff, whom he had arrested, to a public victualling and drinking house, without the free and voluntary consent of the plaintiff, contrary to the stat. 32 Geo. 2, c. 28. *Secondly*, for carrying him to prison within twenty-four hours from the time of the arrest, without the free and voluntary consent of the plaintiff, though the plaintiff did not refuse to be carried to any safe and convenient dwelling-house of his own nomination or appointment within the town of *East Retford*, such dwelling-house not being the dwelling-house of the plaintiff, and the said town of *East Retford* then and there being a market town, and the place where the plaintiff was so arrested, contrary to the statute.

The defendant pleaded the general issue.

At the trial, before *Vaughan, B.*, at the last Summer Assizes for the county of *Nottingham*, it appeared, that the plaintiff had been arrested under a sheriff's warrant directed to the defendant and one *Watmough*. The arrest was made by *Leadbeater*, an assistant of *Pearson's*, by *Pearson's* directions; *Leadbeater* told the plaintiff he must go with him to the *Granby*; and the plaintiff replied, "very well." *Leadbeater* then took the plaintiff to the *Granby* public-house, and kept him there till the following morning, when he delivered him to *Watmough*,

A sheriff's warrant against the plaintiff, directed to the defendant, a sheriff's officer, and one *W.*, was delivered to the defendant to be executed. The defendant employed *L.*, an assistant, to make the arrest, who accordingly arrested the plaintiff, and told the plaintiff, "he must go with him to the *Granby*," to which the plaintiff replied, "very well."

He was then taken to a public-house called the *Granby*, and kept there till the following morning, when *L.* delivered the plaintiff to *W.*, who, it appeared was also an assistant to the defendant, and who, within 24 hours from the time of the arrest, put the plaintiff on a coach for the purpose of taking him to

prison, and took him there accordingly. At the time that the plaintiff was put upon the coach, the defendant was present, and saw the plaintiff on the coach. In an action on the 32 Geo. 2, c. 28, to recover penalties for taking the plaintiff to the tavern without his free and voluntary consent, and for taking him to prison within twenty-four hours:—*Held, first*, that the defendant was liable for the act of *W.* in taking the plaintiff to prison within the twenty-four hours—*secondly*, that, to justify the officer in taking him to the tavern, the consent of the party arrested to be taken there was necessary; and that the mere submission or acquiescence of the plaintiff to the dictation of the officer was insufficient—*thirdly*, that the beginning to carry, and not the arrival at the prison, is to be considered as the carrying to prison—*fourthly*, that the neglect of the party arrested to nominate some safe and convenient dwelling-house to which he might be taken, did not justify the officer in taking the plaintiff to prison within twenty-four hours; and, that it was the duty of the officer to call upon the party to nominate some house to which he might be taken, and that the plaintiff could not be said to have "refused to be carried to some safe and convenient dwelling-house," until the officer had asked him to nominate.

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who was another assistant of *Pearson's*, and *Watmough*, within the space of twenty-four hours from the time of the arrest, took the plaintiff, by the *Amity* coach, to *Nottingham* gaol. *Pearson* saw the plaintiff put by *Watmough* on the coach for the purpose of being taken to prison. The learned Baron put it to the jury, whether they were satisfied that the plaintiff was taken to the *Granby* without his free and voluntary consent; and, whether the plaintiff was taken to prison within twenty-four hours. The learned Judge at the same time intimated, as his opinion, that it was the duty of the party to have nominated a house; and, he not having done so, the officer was justified in taking him to prison within twenty-four hours. The jury found that the plaintiff was not taken to the *Granby* public-house without his free and voluntary consent; and, that he was taken to prison within twenty-four hours. A verdict having passed for the defendant.

Hill, in *Michaelmas* Term last, obtained a rule to shew cause why a new trial should not be had. Against which,

Adams, Serjt., *N. R. Clarke*, and *Humfrey*, shewed cause.—*First*, the plaintiff is, at all events, not entitled to a verdict on the last count, there being no proof that the carrying to prison was done with the authority of the defendant. *Leadbeater* here arrests by *Pearson's* order, and afterwards transfers the custody to *Watmough*, who takes the plaintiff to prison. There is no evidence to shew that the transfer to *Watmough* was made with *Pearson's* authority; and, if *Watmough* had refused to take the plaintiff to any house he had appointed, *Pearson* was not liable for the penalty. There is nothing here to connect *Watmough* with *Pearson*. The officer is not answerable for the penalty, unless he is the person knowingly guilty of infringing the act. Besides, here the warrant upon which the plaintiff was arrested was directed to *Watmough* as well as *Pearson*; and, therefore, *Watmough* had an equal authority with *Pear-*

son; and *Watmough* having an independent authority to act for himself, he must be taken to be acting, not as the agent of *Pearson*, but as principal. *Pearson*, therefore, is not liable. *Pearson's* giving directions to *Leadbeater* to take the plaintiff in time to go by the *Amity* coach the next day, by which coach he is subsequently taken by *Watmough*, does not make *Pearson* liable. The 12th section, which gives the penalty, enacts, "That any sheriff, under-sheriff, bailiff, &c., who shall in anywise offend against this act, shall, for every such offence, &c., forfeit and pay to the party aggrieved the sum of 50*l.*" That is intended to apply to the party actually doing the wrong. The plaintiff has clearly a right of action against *Watmough*. [*Bayley*, B.—Here the arrest is made by *Pearson's* authority. It was held in *Sturmy v. Smith* (a), that the party had the option to sue either the sheriff or the officer. That case was not on this act of Parliament; but, *Peashall v. Layton* (b) arose on this act, and there it was held, that you may recover against either the sheriff or the officer; but you cannot recover against both.] There the sheriff was indemnified; and, according to that case, you may go against the party actually doing the wrong, or against the party whom he represents as the sheriff. There the sheriff was held liable, because he was the person the bailiff represented; but, here, *Watmough* did not represent the defendant.

Secondly. The learned Baron was right in leaving it to the jury to say whether the plaintiff was taken to the *Granby* without his free and voluntary consent. The words in section 12, "no sheriff, bailiff, &c., shall convey or carry any person by him arrested &c., to any tavern &c., without the free and voluntary consent of the person so arrested," mean, that if the party arrested shall either dissent from a place mentioned by the officer, or name any other

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(a) 11 East, 25.

(b) 2 T. R. 712.

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place of his own appointment, it shall be taken to be against his consent. The jury, here, have found in the very words of the statute, that the plaintiff was not taken to the *Granby* public-house without his free and voluntary consent, and the evidence warrants that finding. It is said, that it should have been left to the jury whether the plaintiff went to the house in question by his consent. But there is no set form of words in which a question is to be left to a jury. If he were not taken there without his consent, it must have been with his consent. [*Bayley, B.*—Should not the officer have said this: “I must take you to some safe and convenient dwelling-house, will you name one? Have you any objection to the *Granby*?” The act says, that every such bailiff, &c., shall shew and deliver a copy of the clauses of the act to every person he shall arrest.] That duty does not arise until after he gets to the tavern, before he permits him to have any liquor. The words are, “and carry or go with to any public or other house where any liquor shall be sold;” and then comes a new sentence, “and also shall and will permit any such person so arrested to read over the same clauses, &c., before any meat, liquor, &c., shall be called for.” That clause, therefore, it is submitted, does not apply until he gets to the public-house. The learned Baron left it to the jury, whether the plaintiff was taken to the *Granby* public-house without his free and voluntary consent, and they have found that he was not. Then, is there any evidence to warrant that finding? The evidence of *Leadbeater* is, that he told him he was taking him to the *Granby*, and that the plaintiff replied, “very well.” That, it is submitted, is evidence of consent. The question of free and voluntary consent is a question for the jury; and that question was fairly left to them.

Thirdly. It was the duty of the plaintiff to nominate a house; and, if he neglects to do so, the officer is authorized to take him to prison within the twenty-four hours. The words of that part of the first section are, “nor shall carry

any such person to any gaol or prison within four-and-twenty hours from the time of such arrest, unless such person or persons so arrested shall refuse to be carried to some safe and convenient dwelling-house of his, her, or their own nomination or appointment." The object is, that the party should have an opportunity of getting bail. It must be the intention that the party arrested should nominate; because, in nominating, he would naturally appoint some place where he could most conveniently obtain bail. The words imply, that he shall have nominated a house, before he can be required to go to it, and before he can have any opportunity of refusing to be carried to it.

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Hill and Waddington, contra.—It was contended at the trial, that no action lay against *Pearson*; but that the action, if it lay at all, ought to have been brought against *Leadbeater*, who had committed the offence. Nothing was then said about *Watmough*. But *Leadbeater* had no authority to hand over the person arrested to another officer, though he should be named in the warrant. The rule is, that a party once having process delivered to him, must perfect the execution of it himself, and is liable for any thing wrong committed in the execution of process once delivered to him to execute. The officer to whom the process was delivered, was liable for the acts of the person whom he intrusted as agent to execute the process. *Rex v. Gutch* (a), *Rex v. Almon* (b), *Attorney-General v. Seddon* (c). In the latter case the Court seemed to be of opinion, that, in any case short of felony, the principal was liable for the act of the agent. [*Bayley, B.*—I believe that was a case in which the proceeding was considered in the nature of a civil action.] In *Woodgate v. Knatchbull* (d), it was objected that the sheriff was not answerable for the extortion of his offi-

(a) 1 M. & M. 433.

(c) 1 Cr. & J. 220.

(b) 5 Burr. 2686.

(d) 2 T. R. 148.

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cer; but the Court held that he was. [*Bayley, B.*—No doubt the sheriff is liable for the extortion of his officer. The sheriff would consider the act of the assistant to be the act of the principal, as to any liability that the officer was under to him.]

Then, *secondly*, there was here a misdirection on both points. *First*, with respect to taking the party to the public-house without his free and voluntary consent. The learned Baron said, “You are not to find for the plaintiff unless you are satisfied that he was taken to the *Granby* public-house without his free and voluntary consent.” It was put in the negative. It is submitted, that the officer ought not to have taken him there without his express consent; and, that the learned Judge ought to have so left it to the jury. It is a general maxim of the law, that every body is cognizant of the law; but, the preamble to the 3rd section of this act assumes the contrary, that the party may be ignorant of the provisions of this act; and that section provides, that every sheriff shall deliver a copy of the clauses of this act to bailiffs, &c., who shall be employed to execute any writ, &c., and that the sheriff shall insert a condition in the security bond given by any bailiff, &c., that every bailiff, &c., shall shew and deliver a copy of the said clauses to every person he shall so arrest, and carry or go with to any public or other house, where any liquor shall be sold. The intent of the statute was, that the party under pressure by the arrest, should be acquainted with the provisions of the statute in his favour. If the person arrested is not to be taken to any tavern, &c., without his free and voluntary consent, it is submitted, that the affirmative lies upon the officer to shew, that he had given his express consent; and, therefore, this was a misdirection, because it was left to the jury, whether he was taken there without his free and voluntary consent. Then, as to the *second* point. It has been said, that the officer had a right to take the party arrested to prison, unless he nominated a house of his own appointment; and, that the party ar-

rested was bound to nominate. But, if so, when does the duty of nominating arise? Does it arise *eo instanti* that the arrest was made? There can be no dividing point as to the time. But there is no difficulty on the words of the statute. The words are, "unless such person so arrested shall refuse to be carried to some safe and convenient dwelling-house of his or her own nomination." It must be a refusal, not merely a neglect. Refusal implies application: it supposes that the party has been applied to, to nominate: it is very different from a neglect. Here, the party arrested did not go freely, but was taken to a house of the officer's appointment. The proposal came from the officer, and the plaintiff merely complied with it. The party arrested ought to have the benefit of his own nomination.

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BAYLEY, B.—This was an action on the 32 *Geo. 2*, c. 28, against a bailiff for breach of duty; and there are two charges: *first*, that he carried the plaintiff to a tavern without his free and voluntary consent; and, *secondly*, that he carried him to gaol within twenty-four hours from the time of the arrest. The short facts are, that a warrant, directed to *Pearson* and *Watmough* against the plaintiff, was delivered by the sheriff to *Pearson* to be executed. *Watmough* was an assistant to *Pearson*, and *Pearson* from time to time had his name introduced into his warrants. He had another assistant of the name of *Leadbeater*, and he made the arrest. At the time he made the arrest he said, "You must go with me to the *Granby*;" to which the plaintiff replied, "Very well." He was then taken there, and kept there till the following morning, when *Leadbeater* transferred him to *Watmough*, who put him on the top of the coach for the purpose of taking him to prison. Now, in the first place it was contended, that the act of *Watmough* in putting the plaintiff on the coach and carry-

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ing him to prison, was not an act for which *Pearson* was responsible. This objection was overruled at the trial, and, we think, quite rightly. The arrest was made, not by *Watmough*, but by *Pearson*. *Watmough* stands in a double capacity; he is one of the officers named in the warrant, and he is also an assistant to *Pearson*. There is no difficulty on this point, as *Watmough* must be taken to have acted as an assistant to *Pearson*. *Pearson* sees the fact of the plaintiff being taken to prison. He looks out of his house, and sees the plaintiff's family in distress; and, as it seems to me, he approves and recognises the act; and it becomes his act.

One question arising on the act of parliament was, whether putting the plaintiff on the coach was a carrying to prison within twenty-four hours? It seems to us clear that it was so, when we consider the object of the act of Parliament, which was to give the party arrested an opportunity to apply to his friends to pay the debt, or to procure bail; and, if you were at liberty to arrest, and to put him in a state of being carried to prison within twenty-four hours, you abridge the time; and in reality, in many cases, the whole of the time might be consumed in carrying him there.

The statute in question is an act for the ease of debtors, with respect to the imprisonment of their bodies; and it has two, amongst other provisions, upon which the present action turns: one, as to carrying the person arrested to a tavern without his free and voluntary consent; and the other, as to taking such person to prison within twenty-four hours. The expression of refusal in the latter clause is in very peculiar terms. The words are, "nor shall carry any such person so arrested to any gaol or prison within four-and-twenty hours from the time of such arrest, unless such person or persons so arrested, shall refuse to be carried to some safe and convenient dwelling-house of his, her, or their own nomination or appointment;" "and then, and in any such case, it shall be lawful to and for any such sheriff or other officer or

minister, to convey or carry the person or persons so arrested, and *refusing* to be carried to such safe and convenient dwelling-house as aforesaid, to such gaol, &c.;" therefore, the bailiff is justified in carrying to prison within twenty-four-hours, if the party refuses to be taken to a dwelling-house of his own nomination. There is a clause which throws a light, and furnishes a fair clue to the meaning of these provisions; I refer to the 3rd section, the object of which is, to prevent any person from suffering by reason of ignorance of the act. It requires that the sheriff shall deliver to the officer a copy of the clauses of the act; and it is made a further provision, that the sheriff shall make it a part of the condition of every bond given by any bailiff, &c., that he shall and will shew and deliver a copy of those clauses to every person he shall arrest; and that, if the party be carried to a tavern, a copy shall be delivered to him; and, before he calls for any thing, he is to have the privilege of reading it. Now, the question is, what is the fair construction to be put on the words, "without his free and voluntary consent?" Is it not on the assumption that the party may be ignorant of his right that the act takes special care that the party shall be informed of his rights. If the party knows his rights, and the officer is aware that he does, then he may not require so much information. But, as it seems to me, the expression "free and voluntary consent," is very different from making no objection. I think it assumes, that the party is to be apprized that he has a right of objecting to go to the tavern; and, considering that the provisions of the act are for the relief of the party arrested, I think that the expression "free and voluntary consent" means, that the mind of the party ought to be put into action; and that the officer should make out, not only that it was not against his consent, but that his will was active in consenting.

The *second* question is, what construction is to be put on the words, "unless such person shall refuse to be carried to a safe and convenient dwelling-house of his own no-

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mination or appointment." The point on this was, whether the person arrested can be considered as refusing to be carried to such safe and convenient dwelling-house, unless he previously nominates some place. It seems to me, that he ought to be asked to nominate. That it is the duty of the officer to ask the party to name some convenient dwelling-house, and to say, "if you do not, I must carry you to gaol." The act does not say, if the party shall neglect or omit, but refuse, which is a much stronger word. If the person neglect or omit, he may be ignorant. I think the proper construction as to the language of the statute is, that there must be an active refusal on the part of the person arrested. Unless a question is proposed, so that he may exercise a discretion, there is not, as it seems to me, a refusal. I think that the party cannot be said to refuse to be carried to a safe and convenient dwelling-house of his own nomination, unless he is required to nominate (a). I am of opinion, therefore, that this rule should be made absolute.

VAUGHAN, B.—I think that this case ought to go down for further inquiry. One question was, whether the plaintiff was carried to a tavern without his free and voluntary consent; and the other was, whether he was carried to prison within twenty-four hours from the time of the arrest, not having refused to be carried to any place of his own nomination. On the first point it has been argued, that an express and positive consent was necessary; and that it was not sufficient, that an inference of such consent should be drawn from circumstances, or to prove a case of implied consent. I think that the jury were bound to be satisfied that the plaintiff went to the tavern with his free and voluntary consent, but, that it was not necessary that it should be put in any particular form of words.

The other is a very grave question; and I am by no

(a) This case was recognised, the Court of King's Bench, in *Simpson v. Renton*, Trinity Term, 1833. and the same point decided, by

means prepared to say, that it was not the duty of the bailiff to have put the question to the plaintiff, whether he would nominate a place. I think that the case should go down again for further inquiry; and the parties may put the matter upon the record, if they think fit.

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GURNEY, B.—It has long been the policy of the law of *England*, to give a creditor, to a certain extent, the means of pressure upon his debtor, by arresting and imprisoning him, unless he find bail for his appearance. The execution of the process for the arrest is committed to the sheriff, who delegates it to his officers. It has been proved by experience, that the officers who executed this process, abused the powers with which they were intrusted, for the purpose of oppression and extortion. To repress these practices, and to protect the unfortunate persons who should be subject to their power, the stat. of 22 & 23 *Car.* 2, c. 20, was passed. That act is intituled, “An act for the relief and release of poor distressed prisoners.” And the 9th section contains some of the provisions, which are subsequently incorporated into the statute upon which this action is founded; it made it unlawful to take the person arrested to a tavern without his free and voluntary consent, so as to charge him. This clause was defective in some respects: among others, though it prohibited certain acts, it did not inflict a specific penalty. The ninety years which had elapsed had not reformed the conduct of sheriff’s officers; and the 32 *Geo.* 2, c. 28, was passed. The object of that statute is to be learned from its title and its preamble. It is intituled, “An act for the relief of debtors with respect to the imprisonment of their persons;” and then the other part of the statute is for the benefit of creditors, to oblige debtors, who shall continue in prison beyond a certain time, to make discoveries of and deliver upon oath their estates for their creditors’ benefit. The preamble of the statute is—“Whereas many persons suffer by the op-

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pression of inferior officers in the execution of process for debt, and the exaction of gaolers to whom such debtors are committed; for remedy whereof it may be reasonable, not only to enforce the execution of the laws now in being against such oppressions and exactions, more especially several clauses in the statute of *Car. 2*, but likewise to make some further provision for the ease and relief of debtors who should be willing to satisfy their creditors to the utmost of their power." Then it proceeds to the enacting part—"Be it enacted, that no sheriff, &c. shall carry or convey any person by him arrested, or being in custody by virtue or colour of any action, writ, process, or attachment, to any tavern, without the free and voluntary consent of the person so arrested and in custody." This being the object and intention of the Legislature, and these being the words used to carry that intention into effect, we are not to frustrate the object of the act by giving a forced and strained construction, because they impose a penalty. The words are, I think, to be understood in their plain and obvious sense. Now, what are the facts proved in this case. The evidence is, that *Leadbeater* watched the plaintiff while he was conversing with another person. When he had quitted that person, *Leadbeater* arrested him, taking him by the collar or the coat, and keeping hold of him until he had lodged him in the *Granby*. That is proved by the evidence of eye-witnesses. It had been proved before that the defendant *Pearson* was the sheriff's officer; that the warrant was directed to him and to *Watmough*; that *Leadbeater* and *Watmough* were his assistants; and that the plaintiff was kept at the *Granby* till the next morning, when he was taken by the *Amity* coach to the county gaol by *Watmough*: and that *Pearson* stood by and looked on when the plaintiff was mounted upon the coach; but it was then contended, that the evidence did not reach *Pearson*. This was done to drive the plaintiff to call *Leadbeater* as his witness. A plaintiff

ought to have the ready means of suing the officer of the law who executes process either on his person or his goods. By the manœuvres of the sheriff's officer, a plaintiff is frequently put into difficulty upon this subject; and I have witnessed great injustice, from a plaintiff being compelled to put into the witness box the officer himself, who has been the real and substantial, though not the nominal defendant; and who has, under the influence of the interest which he had in the cause, defeated the plaintiff's case. *Leadbeater* was then called by the plaintiff; and *Leadbeater* proved that he arrested the plaintiff by the order of *Pearson*; that *Pearson* knew of the arrest immediately after it was made; and that he was taken to the *Granby*. By this evidence, the onus of the proof that the plaintiff was taken to the *Granby* with his free and voluntary consent was thrown upon the defendant. The defendant attempted to make that out by the further evidence of *Leadbeater*. *Leadbeater*, on his further examination, says: "I went up to him, and said, 'You must go with me to the *Granby*.' He said, 'Very well.' I took hold of him (*Pearson* having given me charge to take care of him); he made no objection to the *Granby*: he did not ask to go to any other house." This is dictation on the one hand, and submission on the other; and this submission is, in my opinion, something very different from what the statute meant by free and voluntary consent; it is nothing like the free and voluntary consent of a man who is to have an option, and who, I think further, is to be apprized that he has that option. This is a species of case in which the knowledge is all on one side, and in which the legislature has contemplated the ignorance of the person arrested as deserving of especial protection. This appears by the 3rd section—"And to the intent that no person may suffer by reason of his ignorance of the provisions made by this act, be it enacted, that the sheriff shall deliver a printed copy

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of the clauses to the officer who shall arrest any person, and shall make it part of the condition of his bond that he shall and will shew and deliver a copy of the said clauses to every person he shall arrest and carry or go with to any public or other house where liquor is sold, and shall and will permit every such person who shall be so arrested, or any friend for him, to read over the same clauses before any liquor shall be called for. And in case an officer shall offend against the premises, besides the breach of the security bond, every such offence shall be deemed a misdemeanor."

It may be doubtful whether the officer is compellable to produce the printed clauses before he has taken his prisoner to the public-house, but he is not to take him to the public-house without his free and voluntary consent. A submission to the direction of an officer who has him by the collar, is, in my opinion, very unlike a free and voluntary consent.

The second point in this cause arises on a subsequent part of the same clause in the act—"nor shall carry any such person to any gaol or prison within four-and-twenty hours from the time of such arrest, unless such person so arrested shall refuse to be carried to some safe and convenient dwelling-house of his own nomination or appointment, &c.; and then and in every such case it shall be lawful for the sheriff to convey or carry the person so arrested, and refusing to be carried to such safe and convenient dwelling-house, to such gaol or prison as he may be sent to," &c. The jury found, and rightly, that the plaintiff was sent off within the twenty-four hours. The question is, whether the twenty-four hours commence at the sending off or at the depositing in prison. What is the object in giving this delay? It is, to enable the debtor to give an appearance or bail, or to agree with the person at whose suit he is arrested; if the defendant's construction be the true one, and the arrest shall take place sixty,

or seventy, or eighty miles from the county town, he may be sent off instantly on his arrest, and then he is deprived of all opportunity of procuring bail or agreeing with the plaintiff; this would be giving a strained construction to the words, which would totally defeat the object of the act. The carrying must mean the beginning to carry—the debtor is to have the whole twenty-four hours for the purpose of procuring bail or agreeing with the person at whose suit he is arrested, and whether he is taken away at the end of one hour or twenty-three hours, the officer incurs the penalty—he is not to abridge him of a minute. It has been argued by the counsel for the defendant, that, because the plaintiff did not nominate any other place, he refused to nominate. Before he can refuse the proposition, it must be made; the proposition was never made, and he never did refuse. Here again, the defendant has had the benefit of *Leadbeater's* evidence, and he has not ventured to state that the plaintiff refused to nominate, or that he ever informed him he had any choice upon the subject. I have no doubt whatever that the penalty has been incurred. The point taken by my brother *Adams*, that the defendant is not liable for sending the plaintiff off by the *Amity* coach, because that was the act of *Watmough* alone, appears to me not to be sustainable on a correct view of the evidence. I will not say that an action might not have been brought against *Watmough*; but I have no doubt that the action lies against *Pearson*—*Pearson* is the principal, *Leadbeater* and *Watmough* are his assistants—*Watmough's* name is put into the warrant; but *Pearson* sets *Leadbeater* (whose name is not in the warrant) to execute the warrant, and not in his presence; *Pearson* directs *Leadbeater* in what manner the warrant is to be executed; the execution of it is reported to him directly after. About the time the *Amity* arrives, *Leadbeater* delivers the plaintiff to *Watmough*, and *Watmough* takes him by the coach

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to *Nottingham*—*Pearson* standing by when the coach set off, and looking at him; for that act *Pearson* is clearly responsible.

Rule absolute.

ADAMS v. GRANE and OSBORNE.

Goods sent to an auctioneer to be sold on premises occupied by him are privileged from distress for rent.

CASE for an excessive distress, with a count in trover. Plea—Not guilty.

At the trial, before *Vaughan*, B., at the *London* Sittings in this term, it appeared that the plaintiff, who was a manufacturer of feather beds, had sent the goods in question to the rooms of one *Mott*, an auctioneer, to be by him sold there by auction. These rooms were part of a house belonging to one of the defendants, on lease to one *Armstrong*, who had fitted up the lower part of the house as public auction rooms, and was in the habit of letting them out to different auctioneers for their sales. The words "*Armstrong's* auction rooms" were printed in large characters on the outside of the rooms. *Mott* had taken these rooms from *Armstrong* for a week, for a sale which was advertised by him as a sale of goods sold under an assignment for the benefit of creditors, although they really were goods which had been sent by the plaintiff and others to *Mott* to be sold. The defendants distrained the goods in question for rent due from *Armstrong* to the defendant *Osborne*. The learned Baron nonsuited the plaintiff, but gave him leave to move to enter a verdict for the value of the goods.

John Evans accordingly obtained a rule *nisi* to enter a verdict; against which cause was now shewn by—

Platt, Follett, and Channell.—It is a general rule, that

a landlord has a right to distrain all goods that he finds on the demised premises, and it lies upon the party claiming the exemption to shew that the goods seized as a distress are privileged. The cases in which the privilege has been allowed have always proceeded on the extensive ground of public convenience, and for the benefit of general trade, and not for the protection of any particular or individual trade. In *Francis v. Wyatt* (a) the Court were of opinion that a carriage standing at a livery stable keeper's was not privileged from distress, because the trade of a livery stable keeper was not a public trade, and was not for the necessary advancement of general trade. [*Bayley, B.*—If I am not mistaken, one ground of that decision was, that the carriage was staying there for a permanency, and so occupying the premises for which the rent was payable.] So, in *Wood v. Clarke* (b), where all the cases on this subject were brought before the Court, it was held, that a frame delivered by the manufacturer to the weaver, together with the materials, for the purpose of being used in the weaver's house in the manufacture of such materials, was not privileged from distress, because it was not necessary for the protection of trade that such privilege should exist. The several grounds of exemption are stated in *Co. Litt.* 47. a., where it is said—"Valuable things shall not be distrained for rent, for benefit and maintenance of trade, which, by consequent, are for the common wealth, and are there by authority of law; as a horse in a smith's shop shall not be distrained for the rent issuing out of the shop; nor the horse, &c. in the hostry; nor the materials in the weaver's shop for making of cloth; nor cloth or garments in a tailor's shop; nor sacks of corn or meal in a mill, nor in a market; nor any thing distrained for damage feasant, for it is in custody of law; and the like." So, Sir *W. Blackstone*, in his Commentaries (c) says—

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(a) 3 Burr. 1498; 1 Sir W. Bl. 483. (b) 1 Cr. & J. 484. (c) 3 Vol. 8.

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“Valuable things in the way of trade shall not be liable to distress, as a horse standing in a smith’s shop to be shod, or in a common inn, or cloth at a tailor’s house, or corn sent to a mill or market, for all these are protected and privileged for the benefit of trade, and are supposed, in common presumption, not to belong to the owner of the house, but to his customers.” The exemption is allowed only where the withholding it would produce a manifest injury to trade, as corn sent to a mill to be ground, for there it is essentially necessary for the benefit of trade and public convenience that such privilege should exist. The language of the cases always puts it on the benefit to trade and commerce in a large sense; and in all cases where the exemption is allowed, great injury and injustice would be done if such privilege were not allowed. In all these cases the public must necessarily send their goods to the trader, as a farmer must send his corn to a mill, or cloth to a tailor, or a horse to a farrier’s, for it would be idle to suppose that he must have a mill on his own ground, or that he should make his own coat, or shoe his own horse. Besides, the common presumption is, that the corn belongs not to the miller, but to his customers. But this presumption alone would not form a sufficient ground of exemption. In the case of the livery stable keeper, every one must know from common experience that the carriages are not the property of the livery stable keeper. The presumption that the landlord must know that the goods are not the property of his tenant is only one point of exemption. In *Gilman v. Elton* (a) it was held, that goods of the principal in the hands of the factor could not be distrained by the landlord of the factor’s premises. The Chief Justice there, in giving judgment, refers to what Mr. Justice *Ashhurst* said in *Gorton v. Falkner* (b) —“The exceptions out of the general rule are all of

(a) 3 B. & B. 75.

(b) 4 Term Rep. 568; 3 B. & B. 80.

them tending to the benefit of trade and commerce, and general advantage." And the learned Chief Justice himself says (a)—"the public convenience runs through all the cases of exception." Mr. Justice *Park* in the same case says—"The principle of the exception is admirably put by Lord *Holt* in *Salkeld* (b), and his language shews that the exception was not established for the benefit of the individual, but of trade in general." In every instance it is put on the ground of advantage to the public, not to the individual or particular trade. Then what is there in the facts of this case to shew that the privilege contended for is for the benefit of public trade or commerce. This is merely the case of goods sent to be sold at a particular house. [Lord *Lyndhurst*, C. B.—In the case of *Gilman v. Elton*, the Court thought the word "managed" applied to the case of a factor.] The word "managed" has not received any such construction, except in that case, and there the exemption is expressly stated to exist only where it is for the benefit of public trade. [*Bayley*, B.—There are many cases which shew that the protection exists where goods are sent to a particular place to be sold.] If there be any doubt, the defendant ought to have the benefit of it, as the landlord has a clear *prima facie* right to distrain, and the plaintiff must make out that these goods were exempted. This was merely a private house, and the goods in question were household furniture, and the quantity was not more than might belong to the house as furniture. The real origin of privilege from distress was, that the goods were, as expressed in the old cases, on the premises by authority of law, as the party exercising a common trade was obliged by law to receive such goods. It was correctly argued by Mr. Justice *Blackstone*, then at the bar, in *Francis v. Wyatt*, that the privilege from distress applies only to

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(a) 3 B. & B. 81.

(b) Page 250.

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cases where the party is by law *compellable to receive the goods*. The privilege of lien arose from the same cause. In *Francis v. Wyatt* the carriage was not privileged, because the livery-stable keeper was not bound to receive it. [Lord *Lyndhurst*, C. B.—Is a tailor bound to receive cloth sent to him to make clothes.] Yes. Every person exercising a common trade was so bound at common law. *Year Book*, 22 Ed. 4, 49; *Bro. Ab. Dis.* pl. 57; *Roll. Abr. Distress*, 668, pl. 12; *Co. Litt.* 47. a. shew that the privilege in question applies only to cases where the goods are in the place by authority of law. Lord *Coke* there says—“Valuable things shall not be distrained for benefit and maintenance of trade, which are there *by authority of law*.” The auctioneer is not bound to sell the goods; neither is he a trader. The goods are sent to the auctioneer’s on a private contract, as it was said in *Francis v. Wyatt*—“This distinction between the private contract of the parties and the general authority of the law is warranted by the case of the hosteler (a).” The exemption applies only in cases where, under the old law, there would be a lien. In every case before *Gilman v. Elton*, where the privilege has been allowed, the party was compellable by law to receive the goods, and would have had a lien. [Bayley, B.—In *Thompson v. Meshiter* it was held, that goods landed at a wharf and deposited by a factor to whom they were consigned in a warehouse on the wharf till an opportunity for sale should present itself, are not distrainable for rent due in respect of the wharf and warehouse.] That was decided on the authority of *Gilman v. Elton*. It merely followed that case; and that case was decided on the express ground of being in the usual course of a public trade. [Bayley, B.—This is in the usual course of an auctioneer’s business. Suppose I send corn to a mill to be ground on a special contract for payment at the end

(a) *Yelv.* 66.

of six months, could that be distrained? There would be no lien there.] No, the privilege from distress and the right of lien are not co-extensive, though they arise from the same ground, namely, the obligation of the party exercising a public trade to receive goods upon which his skill is to be exercised. But even if, in general, goods sent to an auctioneer for sale were privileged from distress, the exemption could not be applicable in the present case, which was one of fraud. The goods here were represented to be goods sold for the benefit of creditors, when they were not so in fact. This was, therefore, a species of mock auction; and as the party has been guilty of fraud, the privilege ought not to be allowed. [*Bayley, B.*—How does the plaintiff know that it was a mock auction? That may be a fraud on the buyer. *Lord Lyndhurst, C. B.*—Does it follow that a statement which may vary the rights of the parties as between buyer and seller would alter the rights of the parties as to the privilege in question? Suppose a factor were to make a misrepresentation as to goods sent to him to be sold, would that vary the right of the owner in respect to this privilege? What is the difference between a factor and an auctioneer? The object of both is to bring buyer and seller together. They both receive goods for sale, only the auctioneer sells in a particular mode.]

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John Evans and *John Jervis*, *contrà*, were stopped by the Court.

LORD LYNTHURST, C. B.—I am of opinion that the goods in question were not liable to a distress. In the case of *Gilman v. Elton*, it was decided by the Court of *Common Pleas* that goods sent to a factor to be disposed of were protected from distress. Nothing turns on the circumstance of the goods being consigned by a person living at a distance, because, if goods are delivered to a factor, the factor and the owner of the goods residing in

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the same town, they are equally protected when in the possession of the factor for the purposes of sale. Now the present is the case of an auctioneer. What is a factor? A factor is a person who receives the goods of another for the purpose of selling those goods on account of the owner. What is an auctioneer? An auctioneer receives the goods of other persons for the purpose of sale on account of the owner of those goods. There is no distinction turning on the particular mode of sale; and I am of opinion that the principle which applies to the case of an ordinary factor, applies equally to the case of an auctioneer. But then it was said, that the mode of selling in this case was contrary to the usual course of dealing; that it was not usual for auctioneers to sell on their own premises; that it was the business of an auctioneer to go to the premises of his employer and to sell the goods upon those premises. This appears to me to be an entire mistake. In this great town property of the most valuable description is deposited in the hands of auctioneers for the purpose of sale, property to an immense amount in the shape of pictures, in the shape of valuable furniture, in the shape of goods of every description. The course of dealing in the present case has been the established course of dealing. But it is said, that in this case there was something like fraud, from a representation that the goods sent to the auctioneer were goods which had been assigned for the benefit of creditors. It was argued, that this was a false representation, and therefore, that, upon this ground, the goods ought not to be protected. Now, whatever might be the effect of that representation, if it were false, as far as relates to any contract entered into by a purchaser under that representation made by the auctioneer, who was the agent of the vendor, I am of opinion that the principle does not apply to a transaction of this kind, where there was no contract as between the owner of the goods and the landlord of the premises. I am of opinion,

therefore, that there is nothing in that objection. That brings us back, therefore, to the case of *Gilman v. Elton*; and I am of opinion, on the grounds there laid down, and which have been since uniformly acted upon, that the goods in this case were not liable to be taken for distress for the rent.

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BAYLEY, B.—I am entirely of the same opinion. The first question is, whether goods in the hands of an auctioneer, upon the premises of the auctioneer, for the purpose of sale by the auctioneer, are or are not privileged from being distrained for the rent arising due in respect of the auction rooms; and I am of opinion that they are privileged: and I think that they are privileged, because it is for the convenience and benefit of trade and the general common wealth. The privilege in question has been established for a very considerable period of time. Lord *Coke* treats of it as being well known, and the principle of the exemption, according to him, is, that it is for the benefit of trade. Among other instances put by him is the instance of “goods going to a fair or market.” Now, why should they be privileged? They are privileged because *interest reipublicæ* that buyer and seller should be brought together, that a man should have an opportunity of going to some particular place to which goods might be brought for the purpose of sale; and therefore it is one of the old established principles, that goods on their way to a fair, or on their way to market, shall be privileged, for the benefit which results to the public from there being a settled place at which the articles may be bought. It is highly beneficial to the manufacturers of goods, to the handicraft-men, and to many others, who are encouraged to make goods at their own premises by the facility in disposing of them. Where will they be likely to dispose of them? Why, at those places to which purchasers will from time to time resort; they will resort to a fair or to a market;

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and therefore the privilege and the exemption from distress at that place is of great importance to the person who is the proprietor or the original manufacturer of the goods. The privilege has from time to time been extended according to new modes of dealing established between parties; and one of the modern modes is the case of a factor: and I should observe what is noticed by Mr. Justice *Blackstone* in his Commentaries, that there is no hardship in the privilege which is allowed to exist in these cases, because the privilege generally arises to goods which no one could suppose to be the property of the individual from whom the rent was due. The rent is due in respect of premises, for the hiring of which the person who acts in that place is the person amenable for the rent; and if you were to seize the goods of a third person, you would enforce payment not from the man who had contracted to pay but from a perfect stranger, and in reality you would be taking the goods of one man to pay the debt of another. The case of a factor is a case strongly analogous to the case in question; and the two cases which have been mentioned of *Thompson v. Meshiter* and *Gilman v. Elton*, establish the position, that in the case of a factor the goods of the principal on the premises of the factor are exempted from distress for rent issuing out of the premises in which the goods are deposited, and yet those goods are, generally speaking, deposited for a much greater period of time than goods at an auction room. But why are they protected? Why, *interest reipublicæ* (to use the same expression a second time), that the goods of the principal should find their way to a place where there will be a resort for sale; and if you have goods in the hands of a factor, you will be more likely to sell those goods, because the factor's premises will be a place of resort for those very persons who have occasion for goods in which that factor deals. Now, what is an auctioneer? In substance he is a species of factor; but, whe-

ther a species of factor or not, it is his business to bring together buyer and seller. The seller is desirous, and in many instances it is essential, that the goods should be sold on premises belonging to the auctioneer, and not on the premises of the owner of the goods. The premises belonging to the owner may be at a place of no great resort, and may be at a distance from the place where customers would be likely to come. It may be that they belong to persons who have premises of considerable value, and in which it would be inconvenient that an auction should take place. Nothing, therefore, is more common, than that the goods which are intended for sale by auction, should be sent to the auctioneer for sale; and then the public have the opportunity of buying those goods at a moderate rate, that rate being influenced of course by the competition which will there occur; but the seller has the opportunity of bringing his goods to an almost certain market. In reality, the auctioneer is the medium by which buyer and seller are brought together; and that is, as it seems to me, one of the foundations upon which this privilege is to be allowed. But it is said, that, though goods in the hands of an auctioneer in general may be protected, yet that these particular goods ought not to be protected; for that this was a mock auction? How is this a mock auction? It is said to be so, because the goods were described in a handbill as being goods sold for the benefit of creditors under an assignment or bill of sale. There is no proof that the advertisement was prepared at the instance of the owner of these goods, or that he knew that any such bill had been issued. That, however, is a question not between the owner of the premises and the proprietor of the goods, but between him and the man who may bid for and become the purchaser of those goods at the time of the sale; and, therefore, it would be most unjust, as it seems to me, that the circumstances which exist in this case should deprive the goods in question of that protection, which, ge-

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nerally speaking, the law would give them. The party means to sell his goods, and does effectually sell his goods; and, although the practice of puffing may vacate the contract, as between the owner of the goods and the purchaser at the auction, yet, as it seems to me, it does not give the proprietor of the premises a right to seize and distrain such goods. It was suggested in the course of the argument, that if the case were to be considered as depending on the question of public convenience, the defendant ought to have had the opinion of the jury on that point, and that it was a question to be put to them for their consideration; but, as it seems to me, it was a pure question of law; whether a matter is or is not of general public convenience, is not in each particular case to be left to the consideration of a jury; but it is in the breast of the Judges, who are to form their judgment, not on an insulated case, but on general principle. It is on the ground of general public convenience, that I am of opinion, that, in this case, these goods were privileged from distress for rent.

VAUGHAN, B.—I am of the same opinion. All goods and chattels which are not affixed to the freehold are, *prima facie*, when found on the demised premises, liable to be distrained for rent. Upon this general rule, as is well known, many exceptions have been ingrafted; those are found particularly enumerated in the case of *Simpson v. Harcourt*, in *Willes' Reports*; some of the exemptions there mentioned are exemptions *sub modo*, and others are absolute; and among those that are absolute is the exemption in question. In *Gilbert on Distress*, 35, it is said, that valuable things in the way of trade are not liable to distress, as horses standing at a smith's shop to be shod, or at a common inn, or cloth sent to a tailor's shop, or corn sent to a mill or market; for all these are privileged and protected for the benefit of trade, and are supposed,

by common presumption, not to belong to the owner of the house, but to his customers. Now, these instances, which Chief Baron *Gilbert* mentions in the chapter I have alluded to, are taken from *Coke* upon *Littleton*, 47. a., where they are enumerated; but I take them to be, not an enumeration of all the instances to which the privilege is extended, but to be mentioned by way of illustration; and that we must look to the principle, in deciding whether any particular instance falls within the exemption. Now, what is the principle? In the case of *Gisborne v. Hurst*, the rule was laid down with a great degree of correctness, and it has been acted on in all the Courts in *Westminster-Hall* whenever this question has arisen. The rule, as laid down in that case, and adopted afterwards in *Gilman v. Elton*, and all the subsequent cases, is, that wherever goods were delivered to a person carrying on a public trade or employment, to be carried, wrought, or managed in the way of trade, they should be privileged. It does not appear to me that those words are to be scanned with any critical nicety. I should be disposed, certainly, rather to enlarge than to narrow, or cripple in any manner, the construction of the words "carried, wrought, or managed in the way of trade or employment." It was contended, on behalf of the defendant, that we ought to look at the principle, and to see on what it depended; and that, from the earlier cases, it appeared to depend altogether on the obligation of the party to receive the goods; which obligation, it was insisted, gave him the right to a lien on the goods; and that such obligation was the foundation of the privilege. It is not important to the present inquiry what might originally have been the foundation of the privilege, but it has obtained now so long, that we have lost sight of what is called the original foundation of it; and it is laid down as a general principle, that the privilege exists in favour of commerce, trade, and public convenience. It appears to me, therefore, that this falls within all the cases. They were very much reviewed in the case of *Wood v. Clarke*, which

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was alluded to in the course of the argument; there the rule was laid down by Lord *Lyndhurst*, with the acquiescence of the whole Court; and all the cases were then cited, and the principle I have alluded to was there recognised and confirmed. I should have great difficulty in saying that there is any distinction between the present case and the case of a factor: goods are deposited with the factor for the purpose of sale, and, I believe, the common course of all auctioneers is to receive goods and charge so much for warehouse-room, if not sold at the time and left there till a convenient opportunity for selling them may arise. Whether the auctioneer was paid in the form of commission, or how he was paid in this particular instance, does not appear. But, were or were not the goods in question delivered on the premises for the purpose of sale, and in the way of his general employment as an auctioneer? And is it not matter of great public convenience, that facility should be afforded to this mode of disposing of goods of every description? With respect to the suggestion of fraud, it appears to me that the plaintiff is not in any manner connected with any fraud. The auctioneer takes a variety of goods of different persons; and they seem to be all equally privileged if they go there for the purpose of sale; it is impossible for the landlord to suppose that the auctioneer is dealing with those goods, or managing them, as if they were his own. Under all the circumstances of the case, I think that we should very much restrict the rule, which has been too long established now to be broken in upon, if we were to arrive at the conclusion, that these goods on the premises of the auctioneer for the purpose of sale were not privileged from distress.

GURNEY, B., concurred.

Rule absolute.

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CASE against the Sheriff of *Monmouthshire* for an escape under an attachment issued from the equity side of the *Exchequer* for non-payment of costs.

The declaration stated, "that before the committing of the grievances thereafter next mentioned, to wit, on the 23rd day of *April*, A. D. 1831, a certain decree was made and pronounced in and by his Majesty's Court of *Exchequer* at *Westminster*, to wit, at &c., in and concerning a certain suit or action then depending in the same Court, wherein one *Edward Thomas*, clerk, was the complainant, and the said *Walter Blower*, the now plaintiff, was the defendant; by which said decree it was, among other things, ordered, that the bill of the said *E. T.*, so far as it sought an account of certain tithes therein mentioned, should be dismissed out of the said Court, with costs, and that it should be referred to *Richard Richards*, Esq., a Master of the said Court, to tax the then defendant his costs of the said suit; that by the certificate of the said Master made and given in pursuance of the said decree, it was certified that he the said Master had considered the said bill of costs so referred to him by the said decree, and had taxed the same at 381*l.* 4*s.*; that thereupon, to wit, on &c., his Majesty's writ of *subpœna* was duly issued out of the said Court against the said *E. T.*, commanding payment of the said sum of 381*l.* 4*s.* so allowed to the said *Walter Blower* by the said Court, for his said costs, which said writ was then and there duly served upon the said *E. T.*, and payment of the said costs then and there duly demanded; but that the said *E. T.* did not, when the same were so demanded, or at any time afterwards, pay the same; that thereupon the said plaintiff prayed the said Court that his Majesty's writ of attachment might be issued against the said

The order for an attachment for not paying the costs of a suit in equity is in itself *prima facie* evidence that a suit had been pending.

Semble, that a decree in equity is admissible in evidence, though it do not recite the bill and answer, and though no proof be adduced thereof.

Semble, that debt cannot be supported for an escape under an attachment for non-payment of costs under a decree in equity.

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E. T. for his contempt in not paying the said costs, so taxed and demanded as aforesaid; and that afterwards, to wit, on &c., by a certain order then and there duly made by the said Court in the same suit, it was ordered that an attachment should be issued out under the seal of the said Court against the said *E. T.* for his contempt in not paying the said costs; that in pursuance of the said order, the said plaintiff, for the recovery of his said costs, to wit, on &c., sued and prosecuted out of the said Court a certain writ of attachment directed to the said defendant, whereby our said lord the king commanded the said defendant that he should omit not for any liberty, but that he should enter the same and attach the said *E. T.*, clerk, by his body, wheresoever he should find him in his bailiwick, and him safely and securely keep, so that he might have him before the Barons of our said lord the king's *Exchequer*, on the 11th day of *January* then next, to answer our said lord the king concerning divers trespasses, contempts, and offences by him then lately done and committed, and that the said defendant should have then there that writ; which said writ was indorsed as having been issued against the said *E. T.* at the instance of the said plaintiff for non-payment of the said sum of 38*l.* 4*s.*, taxed costs in a cause intitled *Thomas against Blower*." It then went on, in the usual way, to state the delivery of the writ to the sheriff, the arrest, and the escape.

The second count stated, "that before the committing of the grievances, &c., to wit, on &c., *a certain other suit or cause had been and was depending* in his said Majesty's Court of *Exchequer* between the said *E. T.* and the said plaintiff." It then stated the application for the attachment, and the order that an attachment should issue, as in the first count; it then averred, that, in pursuance of the said last-mentioned order, a certain other writ of attachment was duly issued out of the said Court against

the said *E. T.* for his contempt, &c., and directed to the defendant, whereby &c. (setting out the attachment). It then stated the delivery of the writ to the sheriff, the arrest, and the escape, as in the first count.

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The defendant pleaded the general issue—not guilty.

At the trial before *Gurney, B.*, at the *Monmouthshire* Summer Assizes, 1832, the plaintiff put in, and proved, examined copies of the decree and the Master's certificate, whereby the costs were certified to amount to 381*l.* 4*s.* He produced the *subpœna* requiring *Thomas* to pay the costs, proved a demand and refusal of the costs, the order for an attachment to issue for non-payment, the issuing of the attachment, the delivery thereof to the defendant, the arrest of *Thomas* thereon, and his subsequent escape. It was then objected, on the part of the defendant, *first*, that the *decree* was inadmissible in evidence without proof of the bill and answer; and, *secondly*, that the plaintiff had given no sufficient evidence in support of the allegation in the declaration that *a suit had been and was depending between Thomas and the plaintiff*. The learned Judge overruled the objections, and submitted the case to the jury, reserving leave to the defendant to move to enter a nonsuit, if this Court should be of opinion that the objections were valid. The jury found for the plaintiff—damages 200*l.*

A rule *nisi* having been obtained by the *Solicitor-General* to enter a nonsuit according to the leave reserved, and for a new trial, on the ground that the damages were excessive—

Maule, and *R. C. Nicholl*, now shewed cause. With reference to the first point, whether an examined copy of the decree could be received in evidence, without producing the bill and answer, it is submitted that the evidence was admissible and sufficient. The objection seems to have arisen from confounding the case of a decree,

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which is the act and proceeding of the Court, with that of depositions which are of quite a different nature. It is true that depositions cannot be read, without first proving the bill and answer, because, in order that they may be evidence, it must appear that they are material to the issue raised in the suit in which they are given in evidence; and their materiality can only appear by the bill and answer, though in fact sworn to by the witnesses; they may be perfectly extrajudicial, which a sentence or decree cannot be. *Trowel v. Castle* (a), and *Wheeler v. Louth* (b), will be relied on by the defendant; but the former case is so confused and contradictory in itself, as to be an authority neither way, and what was said on the subject in the latter case, seems to have been a mere *obiter dictum*, and perfectly extrajudicial; nor does it appear distinctly in that case, whether the Court, when they said that the sentence would be sufficient upon the libel and answer being produced, were speaking of the admissibility of the evidence or its sufficiency to prove the facts in issue. [*Bayley, B.*—In *Trowel v. Castle*, the decree was produced to shew a custom, and then it might be necessary that the bill should be produced to shew what the issue raised on the custom was.] *Lord Thanet v. Patterson* (c) is in point: it is there said, that “if a party wants to avail himself of the decree only, and not of the answer or depositions, the decree, being under the seal of the Court and enrolled, may be given in evidence without producing the bill and answer.” [*Bayley, B.*—What would the bill and answer prove, if produced? What does it signify for this purpose, whether it were a suit for tithes or not?] *Jones v. Randall* (d) is an authority to shew as well the admissibility of the evidence, as that it was sufficient proof of the

(a) 1 Keble, 21, E. T. 13 Car. 2. N. P. 235.

(b) Com. Dig. “*Evid.*” c. 1. (d) Cowp. 17.

(c) K. B. E. T. 12 Geo. 2, B.

allegation that *a suit had been pending*. That was an action on a wager, whether a decree in *Chancery* would be reversed on appeal; and it was objected that the previous proceedings were not shewn, but the decree only; the Court, however, held, that as the issue was, whether a decree would be reversed, proof of the decree and reversal was clearly sufficient. Now, as nothing is a decree which is not made in a cause pending, the decree itself must have been taken as proof that a cause was pending. Judgments in the Ecclesiastical and Admiralty Courts are analogous to decrees in *Chancery*; and it is the constant practice to admit them in evidence, without proof of the libel and answer. Thus, in the recent case of *Dalglish v. Hodgson* (a), the sentence of a foreign prize court was read without the previous proceedings. So, the probate of a will, in which the judgment of the Court only appears, is always received in evidence without proof of the application for the same by the party propounding the will. If it be true, that the grounds of the decree must be shewn, the argument should be carried farther and extended to all the grounds, viz. to all the depositions as well as the bill and answer, which would be quite absurd.

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Secondly.—The mere order for the attachment, and the fact of the writ having issued in pursuance of the order, afforded in themselves, without the aid of the decree, *prima facie* evidence in support of the allegation in the declaration that *a suit had been pending*; because it cannot be presumed that the process of the Court *improvide emanavit*; *Nightingale v. Wilcoxon* (b); and which must have been the case, had the order been made, and the writ been issued without there having been a previous suit pending. It may, perhaps, be contended, that the bill and answer are the best evidence for this purpose, and

(a) 5 M. & P. 407; S. C. 7 Bing. 495.

(b) 10 B. & C. 215.

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should, therefore, have been proved. But the answer to such an argument is, that although the bill and answer themselves are the best evidence of the contents of the bill and answer, and of the nature of the suit that was pending, yet they are not the best evidence of the fact of there having been a bill and answer, and of there having been a suit pending; *Rex v. Holy Trinity (a)*, *Baker v. Jarratt (b)*, *Alderson v. Clay (c)*; and it was merely for the latter purpose that the evidence was required here.

Thirdly.—The allegations in the declaration, that a suit had been pending and a decree made, were immaterial allegations, and required no proof; for, had the attachment been issued without any suit having been previously pending, or any decree having been made, the defendant could not have taken advantage of the irregularity, inasmuch as the sheriff is bound to execute the process of the Court at all events, even though it may be erroneous; and the writ is always a good defence for him, should an action for false imprisonment be brought against him. *Weaver v. Clifford (d)*, *Gold v. Strode (e)*, *Burton v. Eyre (f)*. It would have been quite sufficient, had the declaration commenced with a statement of the order for the attachment, which is the act of the Court. All the preliminary allegations respecting the pendency of the suit in equity, and the decree there made, may be struck out of the declaration without affecting the plaintiff's cause of action; and whenever such is the case, the allegations need not be proved. *Stoddart v. Palmer (g)*. Besides, it is a rule that the grounds whereon the judgment or the decree of a superior Court in this country has been founded, cannot be inquired into. *Walker v. Witter (h)*, *Bromfield v.*

(a) 7 B. & C. 611.

(b) 3 B. & P. 143.

(c) 1 Stark. 405.

(d) Cro. Jac. 3.

(e) Carthew, 148.

(f) Cro. Jac. 288.

(g) 3 B. & C. 2; 4 D. & R. 624.

(h) Doug. 1.

Jones (a). It is therefore unnecessary to state them; and what is stated unnecessarily, it is not necessary to prove. *Exch. of Pleas,*
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With reference to the second point, namely, whether a new trial should be granted on the ground of excessive damages; it is submitted, that, this being peculiarly a question for the jury, depending on what they conceived to be the chance of again catching *Thomas*, and it being the undoubted province of the jury to ascertain the amount of damages, the Court will not weigh them in a nice balance, or interfere by granting a new trial unless the damages were manifestly, and at the first blush, outrageous and excessive, and clearly evinced passion or partiality. Now, in the present case, the damages were too moderate, instead of being too high. The body of the prisoner was, in contemplation of law, the plaintiff's satisfaction for his costs, which had been ascertained to be 38*l.* 4*s.*; by losing his body, the plaintiff had therefore lost his satisfaction, and yet the jury gave him but 200*l.* In an action for an escape on mesne process, the damages are frequently but nominal; but this is a very different case; there, it has never yet been ascertained that any thing is due to the plaintiff, and *non constat* that he would have recovered against the prisoner, had he not escaped; but, in the case of an escape after judgment at law, or a decree in equity and the Master's certificate ascertaining the amount due, the debt, and therefore the extent of the plaintiff's loss, cannot be disputed. An attachment for non-payment of costs, is a proceeding in the nature of execution or final process. It has been held, that a person in custody on such a writ may be discharged under the Lords' Act, which only applies to prisoners in execution. *Rex v. Stokes (b)*. And in *Phelps v. Barrett (c)*, an attachment was expressly held to be in the nature of an execution. It is quite clear, had the plaintiff sued in debt,

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(a) 4 B. & C. 480.

(b) Cowp. 136.

(c) 4 Price, 28.

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instead of case, he must have recovered the whole 381*l.* 4*s.*, instead of the 200*l.* which the jury gave him; and the form of action cannot affect the rights of the parties. *Bonafous v. Walker* (a). [*Bayley, B.*—The action of debt is the remedy for an escape under a *ca. sa.*, and that by statute 1 *R. 2*, c. 12.] That statute has been construed liberally, and the present case is within the spirit of it. Besides, in *Lewis v. Morland* (b), an action of debt was brought for an escape under an attachment for non-payment of costs, and no objection was taken to the form of action. [*Bayley, B.*—That case went off on another ground, or the objection, no doubt, would have been taken, and most likely with success.] It will be said, perhaps, that the plaintiff may sue out fresh process for his costs, and so recover them; but that observation equally applies to the case of an escape under a *ca. sa.*, the plaintiff may there have fresh execution, and yet he shall recover his whole debt from the sheriff.

Talfourd, contrà.—The decree in this case did not even recite the bill and answer. Had the bill and answer been recited in the decree, their production might perhaps have been dispensed with; *Wheeler v. Louth* (c); but there is no case in which it is held that a bare decree in Chancery, which does not at all notice the previous proceedings, is in itself evidence. A judgment at law is very different; there, all the proceedings, pleadings, and verdict are entered on the record, and form part of the judgment. [*Bayley, B.*—The second count does not state a decree. The Court would not have granted the order for the attachment, unless a suit had been pending.] *Secondly*, The damages were excessive; for, in the first place, had *Thomas* remained in custody, his property is already so incumbered that the plaintiff could have got nothing out

(a) 2 T. R. 126. (b) 2 B. & A. 56. (c) Com. Dig. Ev. c. 1.

of him; and, in the next place, if he has any property, the plaintiff may still have fresh execution against it for his costs.

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Talfourd then stated, that an offer had been made by the plaintiff's counsel to furnish the defendant with every remedy the plaintiff had against Mr. *Thomas*, if the defendant would submit to the present verdict; but he said that he could not agree to that offer without consulting his client.

BAYLEY, B.—It is unnecessary to decide whether the decree was admissible in evidence without a recital, or any proof being afforded of the bill and answer; for I think that the order for the attachment for non-payment of the costs of the suit is of itself *prima facie* evidence in support of the allegation with which the second count commences, that *a suit had been pending, &c.*, and it is sufficient if the evidence maintained either of the counts. With reference to the damages, I think that the offer made by the plaintiff is very fair, and that the defendant should have a week to consider of it (a).

VAUGHAN, B.—I entirely agree with what has fallen from my learned brother. The damages do not appear to be excessive. Even in actions for escapes on mesne process, the damages are not necessarily nominal. The jury may, with propriety, and frequently do, give the whole amount for which the prisoner was arrested.

BOLLAND and GURNEY, B.'s, concurred.

Rule discharged.

(a) The defendant afterwards refused to accede to the proposal, and the rule was discharged unconditionally.

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PENNINGTON v. HEALEY.

An administrator sued a debtor to his intestate, and recovered a verdict against him; and the debtor, being in gaol, subsequently petitioned to be discharged under the Insolvent Act. The debtor offered terms, whereby he was to be liberated on payment of 150*l.*, a sum less than the costs incurred in the action. The administrator agreed to the terms, and liberated the debtor:—*Held*, in an action brought against him by a creditor of the intestate, that he was not chargeable with any part of the debt as assets.

DEBT on bond against the defendant, as administrator of one *William Healey*, deceased. Plea—*Plene administravit*. Replication—Assets to be administered.

At the trial before *Park, J.*, at the last Summer Assizes for the county of *Lincoln*, it appeared that the intestate left his residence in *Lincolnshire*, having between 700*l.* and 800*l.* of ready money about his person, with the intention of proceeding to *America*. In the year 1825, it was ascertained that he had arrived at *Liverpool* in the month of *October*, 1823, and that, whilst waiting there for a passage to *America*, he had died at the house of one *Jones*, a pilot; and that *Jones* had, either during his illness or after his death, possessed himself of the money which he had with him. The defendant, being the brother and next of kin of the intestate, on the 29th *October*, 1825, took out letters of administration to the intestate's effects, swearing them to be under 800*l.*, and commenced an action against *Jones* to recover the money taken possession of by *Jones*. The cause was tried at the *Chester* Assizes, in the Spring of 1826, when the jury found a verdict for the plaintiff for 750*l.* *Jones* had been arrested on mesne process in the first instance, and taken to *Lancaster* castle, where he was confined until *December*, 1826. A new trial was moved for in the *King's Bench*, and a rule *nisi* granted. Pending this rule, *Jones* applied to take the benefit of the Insolvent Debtors' Act. After *Jones* had filed his petition, terms of compromise were proposed to the present defendant by *Jones's* friends, according to which terms *Jones* was to be liberated on payment of 150*l.* The terms were accepted by the defendant, who received the 150*l.*; and *Jones* was thereupon released from prison under the compromise. It was proved that the costs of the action against *Jones* exceeded 150*l.*

The jury having found a verdict for the defendant—

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N. R. Clarke obtained a rule to shew cause why the verdict should not be set aside, and a new trial had. He cited *Brightman v. Keighley (a)*, and contended that the defendant was liable to be charged with the whole debt as assets, he having discharged *Jones* from the same.

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Adams, Serjt., shewed cause.—This case is distinguishable from *Brightman v. Keighley*, because there the executor chose to give a release of all actions; and the parties entitled to the assets would thereby be deprived of their rights, unless the executor were held liable. There, the executor was within age at the death of the testator, and the ordinary granted administration to *A.* and *B.*, who administered; and they had in their hands, when the defendant came of age, 600*l.* of the goods of the testator. The defendant, when of age, proved the will, and then released to *A.* and *B.* all actions; and it was adjudged to be assets. If the representative voluntarily releases the debtor, it is, undoubtedly, as though he recovers assets to the amount released. [*Bayley, B.*—The executor is chargeable for all he does release, and for all he has received, or in the honest discharge of his duty might receive.] The effect of making this rule absolute would be to prevent a compromise when the interest of the testator's or intestate's estate required that it should be made. The question is, whether the defendant has acted fairly, honestly, and *bond fide*, in making the compromise. To what amount is he chargeable, if at all? Is it for the amount of the whole sum for which the jury gave their verdict, namely, 750*l.*, or the sum for which the compromise was made? It is submitted, that the defendant is not chargeable, as he has obtained all he could. The compromise was in the fair and legitimate discharge of his duty as administrator. The

(a) *Cro. Eliz.* 43.

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rule for a new trial was pending when the compromise took place, and *Jones* had petitioned to take the benefit of the Insolvent Act; and, under the circumstances, the defendant did the best that he possibly could.

N. R. Clarke, contrà.—It was not left to the jury, whether or no the compromise was fair and beneficial. It was put to them, whether it was fit or proper that the defendant should be called upon to pay out of his own pocket, money which he had never received. It is submitted, that the whole debt was assets. In the case in *Cro. Eliz., Anderson, J.*, said: "The doubt was where it was uncertain what the executor released, and for that only an account lieth; but here the certainty appeareth by the verdict;" and *Periam, J.*, said: "If an executor doth release an account, and it is not certain what he shall recover, it is not assets; but, if it appear or be proved that so much was due, it is assets." So, *Wentworth*, in speaking of a *devastavit*, says (a): "If an executor upon a bond of 200*l.* forfeited for payment of 100*l.*, accept the principal, or perhaps also some use, costs, or damage, and give a release or acquittance of the whole forfeited bond, or of all actions, or upon record acknowledge satisfaction upon judgment had; this is a wasting of so much as the penal sum is more than is received, and so far his own goods stand liable to creditors not satisfied; and so doubtless is it, if he do but give up the bond having no judgment on it, though he neither make release, or acknowledge satisfaction." As this is an abandonment of all claim to the debt, it is, upon the principle here laid down, a *devastavit*, and renders the administrator liable. In *Kniveton v. Latham* (b), where the obligee had paid the principal debt and interest, *Berkeley, J.*, held, that the giving a discharge of the penalty was a *devastavit*. [*Bayley, B.*—Is not that too strong?] In *Co-*

(a) Pages 158, 159.

(b) *Cro. Car.* 490.

myns's Digest (a), it is said: "So if an executor release, or acquit the bond, being forfeited. [Bayley, B.—The question in this case is, whether, if he made a reasonable compromise, and could not have got more, and would not have got any thing in all probability if he had gone on, is he chargeable? The authorities cited refer to a release; but it may be, even in that case, that they apply only to a release where the executor has not recovered or been paid all that was really due.] It is submitted, that it is a matter of strict law. If the administrator is entitled to any relief, it is in a Court of equity. In a note to Mr. *Williams's* book on Executors (b), it is said: "Where the executor delivered up a bond due to his testator, and took a new bond with surety to himself for the debt, it was held, that this, though a conversion in law, was none in equity. *Armitage v. Metcalfe* (c). In that case it was admitted that at law the executor was charged. In *Russell's* case (d), it was held, that a release should not bind an infant executor; because, if it were to be so held, it would be a *devastavit*. [Bayley, B.—That does not appear to have been a compromise—a reasonable compromise. Is there any case where it has been held, that, where an executor arrests a debtor, and gets all he can from him, or is likely to get, he makes himself personally liable (e)?]

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Cur. adv. vult.

BAYLEY, B.—The question in this case arose on a plea of *plene administravit*. There was no evidence, that the

(a) Tit. *Administration*, (I l.)

(b) Page 1108.

(c) 1 Chan. Cas. 74.

(d) 5 Co. 27.

(e) In Mr. *Edward Vaughan Williams's Treatise on Executors*, p. 1100, the learned author says: "But though, generally speak-

ing, an executor compounding or releasing a debt must answer for the same, yet, if it appears to have been for the benefit of the trust estate, it is an excuse;" and cites *Blue v. Marshall*, 3 P. Wms. 381. That case, however, was in equity.

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defendant had actually received any assets; but it was contended, that he was liable in respect of having compromised the demand against a debtor of the intestate, and having discharged him from prison. Executors and administrators are chargeable, if they have received assets, or if assets might have been received by them; also, if they have taken a new security, or if they have given a release of a debt; if, in fact, they have changed the nature of the security, or, without an adequate cause, have disabled themselves from suing for or obtaining debts which might have been recovered. Now, it is on the latter ground that it is said that the present defendant is chargeable. The facts were these: *Jones* was indebted to the intestate. The present defendant sued him, and obtained a verdict against him for 750*l.* *Jones* moved for a new trial, and a rule *nisi* was granted. *Jones*, on being arrested on mesne process in this action, went to *Lancaster Castle*, and remained there from the spring of 1826, until the month of *December* in the same year. At that time he proposed terms, and those terms were, that he should be liberated on payment of the sum of 150*l.*; and the administrator, in the exercise of his discretion, agreed that he should be so liberated; all that was received was 150*l.*, and the expenses of the administration and the suit exceeded 200*l.* The plaintiff contended, that the liberation of *Jones* was a *devastavit* in the defendant, and made the defendant answerable to the extent to which *Jones* was answerable; and he cited *Brightman v. Keighley* (a), *Cock v. Jenner* (b), and several other authorities in support of that position. The case of *Brightman v. Keighley* certainly does decide, that, if an executor releases a debt, he admits assets to the amount of such debt; and *Periam, J.*, gives this reason for it, "that the law presumeth he has received so much as he doth release."

(a) Cro. Eliz. 43.

(b) Hob. 66.

There is a dictum to the same effect in *Hobart* (a)—“If an executor release, the debt released is judged assets in his hands.” There are many other cases put in the books, but they are all cases in which there was an actual release, and in which it does not appear that the executor had any reason for giving the release, or that he gave it upon an honest compromise. This is a case in which the release is by operation of law. The administrator has here adopted the course most likely to obtain payment of the debt by pressure and suing the debtor; and I should say that it would be monstrous, if the law were as contended for on behalf of the plaintiff. If the law were as contended for, an executor or administrator must either keep the debtor in gaol all his life, or be liable to any creditor to the amount of the debt; and not only to any creditor, but to the next of kin. I have looked into the authorities, and can find none which supports so monstrous a proposition; and I should be sorry if I had. The true question is this—does the party exercise a reasonable and honest discretion in making the compromise? If so, it seems to us that the executor is protected, not only by going into equity, but at law. The general rule of law is, that the executor is accountable for all which he has received, or which, in the honest discharge of his duty, he could or might obtain. Now, in this case, the compromise was for the payment of 150*l*. Great expenses had been incurred, exceeding that sum. The debtor had lain in prison a considerable time, and had petitioned the Insolvent Court for his discharge. Then, if the administrator could extricate himself from the responsibility in which he had been involved by the letters of administration, and could reimburse to himself the costs incurred, it seems to me that it was a fair and reasonable compromise. If, in this case, the plaintiff had been disposed to take the opinion of the jury on the question, whether the compromise was or was not fair or reasonable, the learned Judge was

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(a) *Hob. 66.*

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ready so to leave it; but I think, looking at the evidence, that no jury would have considered it unfair or unreasonable. There is a good reason why, in many cases, the taking a new security should render the executor liable. In many instances it extinguishes the original debt, and is a *quasi* payment to the executor; in many cases, on the death of the personal representative, the right to sue would go in a different channel. The administrator *de bonis non* would be the person to sue on the original bond, and the executor of the administrator on the new one. We are, therefore, of opinion that the administrator in this case has not rendered himself liable, and, consequently, that this rule should be discharged.

VAUGHAN, B., concurred.

GURNEY, B.—In one case that was cited from *Cro. Car.* (a), three of the justices out of the twelve held, that the release by the executor, upon receipt of the principal money and interest, was not a *devastavit*, and on this ground, that what the executor had done was no more than what in justice and equity he ought to have done.

Rule discharged.

(a) Page 490.

HASKER v. JARMAINE.

Where the writ was irregular, but the service was regular, and the defendant moved to set aside the service for irregularity, the Court discharged the rule.

CHILTON obtained a rule to shew cause why the service of the writ should not be set aside for irregularity, on the ground that the writ was not dated on the face of it, according to the 2 *Will.* 4, c. 39, s. 1, sch. No. 1.

Platt shewed cause.—The date here appears by the indorsement, and it is submitted, that, if the date appears

by the indorsement, that is sufficient. [*Bayley, B.*—No. We have decided that it is not.] At all events, the objection, if any thing, is to the writ and not to the service. The service was perfectly regular.

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Chilton, contrà.—We find the writ irregular, and we move to set aside the service of that irregular writ. [*Bayley, B.*—You might have moved to set aside the writ and the service. We cannot say that the proceedings are more irregular than you state them to be. We cannot get at the writ to say whether it is regular or irregular. If you had applied to set aside the writ we should have had no difficulty.] It is submitted, that, as the writ was irregular, there cannot be a regular service of such irregular writ. In *Miller v. Bowden* (a) the service of a *quo minus* was sought to be set aside because the day of the month and year on which the same was issued was not indorsed on the process in pursuance of rule 1 *M. T.* 1 *Will.* 4; the motion there was to set aside the service and not the writ, and no objection was made to the form of the motion on that ground.

BAYLEY, B.—If, in this case, you had applied to set aside the writ and service, or writ or service, the Court might have made the rule absolute as to the one, though not as to the other. In this case a true copy of the writ has been duly served. If it had not been a true copy, or if it had not been properly served, we should have set aside the service for irregularity. Where you object to the service of the writ, you ought to shew some deficiency in the service.

The other Barons concurred.

Rule discharged.

(a) 1 *Crompt. & Jervis*, 563.

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GLEADOW and Others, Executors of GLEADOW, *v.* ATKIN
and Another, Executors of ATKIN.

Where, in debt on a bond more than twenty years old, to rebut the presumption of payment, the obligee gave evidence of payments of interest by the obligor to *A. B.*, equal in amount to the interest that would become due on the bond:—*Held*, that an indorsement on the bond in the handwriting of the obligee, and which appeared to have been made at or about the time when the bond was executed, but which was not proved to have been ever seen by the obligor, stating that the bond was given to the obligee in trust for *A. B.*, was admissible in evidence to connect the payments of interest with the bond.

DEBT on bond by the plaintiffs, as executors of *Robert Gleadow*, deceased, against the defendants, executors of *John Atkin*, deceased.

Pleas—*First, Non est factum.*—*Secondly, Solvit ad diem.*—*Thirdly, Solvit post diem.* Upon which issues were joined.

At the trial before *Parke, J.*, at the last Summer Assizes, at *York*, it appeared, that, in the year 1800, a Mr. *Cuthbert Thew* died, having made a will, by which he bequeathed to the said *Robert Gleadow* and the said *John Atkin*, and the survivor of them, certain personal property, in trust to sell and dispose of the same; and, when converted into money, to place the proceeds out on such real or other sufficient security as they should approve of, and then to pay the interest thereof to his wife, *Margaret Thew* (who at the time of the trial was still living,) for her life; and after her decease, to pay the principal monies in discharge of certain legacies. The will contained the usual declaration, that each of the trustees should be only answerable for his own acts. The testator appointed the said *R. Gleadow* and *John Atkin*, joint executors of his will, which they duly proved on the 6th of *November*, 1800. The executors received the sum of 250*l.* under this will, and *Atkin*, wishing to make use of the money, agreed to give *Gleadow* a bond for the amount, which he accordingly did on the 17th day of *September*, 1805. *Atkin* died in 1827, and *Gleadow* before that time. The execution of the bond was proved by one of the attesting witnesses, *William Pybus*, and it was produced and read. On the back of the bond there was the following indorsement:—

“ I, the within-named *Robert Gleadow*, do hereby acknowledge that the within-mentioned principal sum of

250*l.*, is not my own proper money, but trust money under the will of the late *Cuthbert Thew*, to be placed out by myself and the within-named *John Atkin*. As witness my hand, 17th *September*, 1805.

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“ Witness, *William Pybus*.” “ *Robert Gleadow*.”

The bond being twenty-seven years old, the plaintiffs, to rebut the presumption of payment, proved payment of interest by *Atkin* to Mrs. *Thew*, equal in amount to the interest that would become due on the bond, about the year 1826 or 1827; and, in order to apply that payment to this bond, proposed to give the indorsement in evidence. It was proved by the attesting witness, *William Pybus*, that it was his signature, as attesting witness; but the only recollection he had of it, was from seeing his name as a witness to the indorsement. The indorsement was written and the bond filled up by *Pybus*. The date of the bond and of the memorandum were in the handwriting of another person, named *Jackson*. The memorandum bore the same date as the bond. The signature of *Gleadow* to the bond and memorandum appeared to have been written with different ink. It did not appear that the obligor had ever seen the indorsement.

Pollock, for the defendants, objected that the indorsement was not admissible in evidence; but the learned Judge overruled the objection, giving the defendants leave to move to enter a nonsuit.

F. Pollock, having obtained a rule accordingly—

R. Alexander shewed cause. The indorsement was admissible in evidence—*First*, on the ground of its being a contemporaneous act with the execution of the bond, and forming part of the original transaction. The cases on this subject are collected in 1 *Phill. on Evid.* 231-2, and the rule is thus laid down:—“ Hearsay is often admitted

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in evidence, as constituting a part of the transaction which is the subject of the inquiry; the meaning of which seems to be, that, where it is necessary to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it, is admissible in evidence for the purpose of shewing its true character." In *Kent v. Lowen* (a), it was held, that letters from the payee to the maker, stating the consideration between them, if shewn to have been contemporaneous with the making of the note, are admissible in evidence to prove the consideration passing between the parties. On the same principle, in *Thompson and Wife v. Trevanion* (b), which was an action of trespass and assault, Lord Chief Justice *Holt* allowed what the wife said immediately on receiving the injury to be given in evidence. In *Aveson v. Lord Kinnaird* (c), (where, in an action on a policy of insurance for life, in order to ascertain whether the deceased was in a good state of health on the day of the insurance, it became material to consider what the state of health was both before and after that day), the account which the deceased gave some days after obtaining the certificate of good health, respecting her state on the former day, was admitted at the trial as evidence on the part of the defendant; and the Court of *King's Bench* were of opinion that it had been properly admitted. If, therefore, this be a contemporaneous act, it is admissible in evidence. Then, was it a contemporaneous act? The date of the indorsement corresponds with the date of the bond; and the presumption is, that it was rightly done. *Gleadow* could have had no interest to put this declaration of trust on the bond at any subsequent time. But it may be said, that the colour of the ink was different. This was a bond to be executed by the obligor, *Atkin*, only; although executed by *Gleadow* also. But it was not necessary that *Gleadow* should sign the indorsement at the same time

(a) 1 Cowp. 177, 180 d.

(b) Skin. 402.

(c) 6 East, 194.

and with the same ink. He might have signed it at his own house afterwards, in the presence of *Pybus*, who attested the execution of both the bond and indorsement. In *Burgh v. Preston* (a), it was held, that the memorandum must be taken as part of the instrument, if written before it is executed; and Lord *Kenyon* there cites *Moor*, 679, where the question was, "Whether a memorandum indorsed on a bond before the execution of it, should be considered as explanatory of the intention of the parties respecting the operation of the condition:" *Popham*, J., was clearly of opinion that it should, it being a contemporary act.

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Secondly, The indorsement is admissible as a declaration against interest. The rule laid down in *Phill. on Evidence* (b) applies in every respect: "The declarations or statements of deceased persons have been admitted in many cases where they appear to be made against their interest, as entries in their books, charging them with the receipt of money on the account of a third person, or acknowledging the payment of money due to themselves; in either case, the entry is to their own immediate prejudice." And, as it is said by Sir *T. Plomer*, in *Short v. Lee* (c), "The principle is, that the entry is made by an individual conusant of a fact, at a time when it was not in dispute, having no interest to make a false entry, and making one tending to charge himself." So, in *Ivatt v. Finch* (d), it was held, upon an issue between *A.* and *B.*, whether *C.* died possessed of certain property, that evidence might be given of declarations made by *C.* that she had assigned the property to *A.* In *Roe v. Rawlings* (e), Lord *Ellenborough*, in delivering the judgment of the Court, said: "The contents of the paper were adverse to the title of the person who had the possession of it, by diminishing the interest in

(a) 8 T. R. 483.

(b) Vol. 1, 255.

(c) 2 Jac. & Walk. 475.

(d) 1 Taunt. 141; 1 Ph. Evid. 255.

(e) 7 East, 279, 290.

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the fine on the renewal, in the same proportion as it raised the rent to be reserved. Then, at such a distance of time, with the means of knowledge which he had of the fact, and his interest in declaring it the other way, we think that his declaration is evidence to go to the jury." So, in this case, the indorsement, adverse to the interest of the party making it, remained in the possession of the party making it. In *Searle v. Lord Barrington* (a), it was held, that indorsements on the bond, in the handwriting of the obligee, of payments of interest, were admissible in evidence, to rebut the presumption that the bond had been paid. That was an action on a bond, brought by the plaintiff, as administratrix of her deceased husband (the obligee) against the defendant, as administrator of the obligor. The defendant insisted on the length of time that had elapsed between the date of the bond and the commencement of the action, which was about twenty-seven years, as raising a presumption that the money had been paid. In answer to this, the plaintiff offered in evidence two indorsements on the bond, in the handwriting of the obligee, one dated in *December*, 1699, the other in *March*, 1707, purporting that the whole of the interest had been paid up to the time of those dates. The Court of *King's Bench* held that the indorsements in question ought to have been left to the consideration of the jury. The case having been subsequently removed to the *Exchequer Chamber*, and from thence to the House of Lords, the judgment of the *King's Bench* was affirmed. There no proof appeared to have been given of the indorsements having been made at the time when they bore date; and this was one of the grounds of objection on the argument in the House of Lords. Nor was there any other direct proof of the indorsements having been made within twenty years. So, in *Bosworth v. Colchett* (b), it was determined

(a) 2 Phil. on Ev. 172; 2 Stra. 826; 8 Mod. 279; 2 Ld. Raym. 1370.

(b) 2 Phil. on Ev. 143.

by the House of Lords, that, where the payee of a promissory note had written indorsements of the half-yearly payment of interest, from the time of making the note until his death (which happened within six years of the date of the note), like indorsements of his executor (who died before the commencement of the action,) were admissible in evidence in answer to a plea of the Statute of Limitations; though there was no extrinsic evidence offered of the time when the indorsements were made, and though more than six years had elapsed between the death of the maker of the note and that of the executor. It is submitted that those two cases shew, not merely that the indorsements were admissible, but, that the date, at which they purported on the face of them to be made, must be taken, *prima facie* at least, to be the time when they were made. In *Sanders v. Meredith* (a), it was held that payment within twenty years of interest accruing before twenty years, indorsed on the bond, is an acknowledgment that the principal was then due, sufficient to rebut the presumption of payment. In that case the bond was dated the 2nd of June, 1804, and the indorsement relied on was as follows:—"Exeter, Aug. 13th, 1808.—Received of the within-named J. W. three years' interest on the within bond, due the 2nd of June, 1807. *Daniel Sanders*." Mr. Justice Bayley there says: "It is said, that this was not a payment of interest accruing within twenty years, but up to June, 1807, only. I think it was an acknowledgment that it was, at that period, a good, valid, subsisting bond." And Mr. Justice Parke says: "The simple payment of interest which has accrued within twenty years, is a clear acknowledgment that the bond was unsatisfied. Payment within twenty years of interest which accrued beyond the twenty years, is only proof that such a bond once existed. But the making of the indorsement on the bond itself, in 1808, is an admission that the debt was a valid subsisting

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debt within the twenty years. I rely not so much on the payment of interest as upon this circumstance." [*Bayley*, B.—Was the indorsement attested in that case?] No; but a witness was called, who proved the fact of payment. The case of *Chambers v. Bernasconi* (a), which is relied on by the other side, does not apply to the point in discussion. There the question was, whether a written memorandum, sent by a sheriff's officer to the sheriff's office, and there filed, stating that he had arrested *A. B. at a particular place*, was admissible in evidence to prove the place of such arrest. Lord *Lyndhurst* there says: "I am of opinion that the reception of such evidence goes much beyond any of the cases on the subject." And Mr. Baron *Bayley* there says: "I doubt, even supposing that this paper was receivable at all, whether it was receivable to prove the *place* where the arrest happened. The principle acted upon in the cases of *Doe v. Robson* (b), *Higham v. Ridgway* (c), and *Middleton v. Melton* (d), was, that it was against the interest of the party to make the statement at the time of making it. Now, I cannot see how the statement, in the present case, was against the interest of the officer." No one can doubt here, that this indorsement was against the interest of the obligee. [*Bayley*, B.—This was an indorsement which *Gleadow* was bound to make in discharge of a moral duty.] Yes; and therefore the evidence is more authenticated. The case of *Searle v. Lord Barrington* was followed by the case of *Turner v. Crisp* (e). There an indorsement by the obligee, purporting that part of the principal sum had been received, if made after the presumption of payment had arisen, was held to be clearly inadmissible. The distinction there is, that, after twenty years, it was the interest of the obligee to make the indorsement, because, then the presumption of payment would have begun to run. [*Bay-*

(a) 1 Cr. & J. 451.

(b) 15 East, 33.

(c) 10 East, 109.

(d) 10 B. & C. 317.

(e) 2 Stra. 827.

ley, B.—The same distinction was taken in *Glyn v. Bank of England* (a), that the indorsement was against the interest of the obligee.] Yes; and that case recognises *Searle v. Lord Barrington*. That case was much pressed, and it was objected that it would be making a man's own handwriting evidence for himself. Lord *Hardwicke* there says: "The rule is, that a man cannot make evidence for himself. What he writes or says for himself cannot be evidence of his right; and, consequently, cannot be for his representatives claiming in his right and place. As to the cases cited to prove that it may, the first is that of indorsements by the obligee of the payment of interest; but that is different: it is not a case to prove the original right to the thing in demand at all. Indorsements by the obligee of the payment of interest of a bond are evidence against that obligee originally in the nature of the thing; and the other is only consequential evidence to take it out of the presumption arising from length of time, that he ought to have the benefit of it on the other hand; and in that case, (viz. *Searle v. Lord Barrington*,) I take it the indorsements were made and bore date within the twenty years; for if those indorsements were made after the expiration of twenty years, though they were evidence of the actual payment of interest after that time, they would not be evidence to take it out of the presumption." [*Bayley, B.*—Here this must be against the interest of the obligee at all times.]

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F. Pollock and Cresswell, contra.—The question involved in this case is very important, viz. under what circumstances an entry made by a party may be used as evidence in his own behalf. Various cases have been cited, bearing some resemblance to the present, and several grounds have been stated on which it is said that the indorsement in question was admissible in evidence. But if those cases are divided into classes, and the principles

(a) 2 Ves. 43.

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upon which they proceeded are examined, it will be seen that one class only is applicable to the present—and as the cases even of that class are distinguishable from this, and the principle on which they proceeded has been reprobated by the Legislature, the Court will not extend the rule, so as to make it govern their decision in this instance.

First—It was said, that it was the duty of the obligee to make this indorsement, and that the rule *omnia presumuntur rite esse acta* applies; and that the party must be presumed to have performed that duty properly. [*Bayley, B.*—That is not put as a distinct ground, but only as a circumstance in the case.] If it be not a distinct ground it ought not to assist the plaintiff, for questions of evidence should be decided by some acknowledged principle. But, if the Court will look to the principle of the rule of law alluded to, they will see that the duty of the party ought to form no ingredient in considering the question of the admissibility of this indorsement in evidence. Presumptions arising from the act being according to the duty of the party, (more properly called presumptions of innocence), means only, that, where it is the duty of a public officer to do a certain act, and he would be criminally responsible for not doing it, he shall, in the absence of conflicting evidence, be presumed to have done it (a). [*Bayley, B.*—The law never presumes illegality.] Here, it is not so the duty of the party to make the indorsement, that you would presume that he did it, without evidence to shew that he had made it. It is, at most, only a moral obligation. It was as much the duty of the obligee to keep regular accounts of the trust fund, as to make indorsements on the bond. Would the Court presume that he had done so? or, if he had, that they were correct? Or, would an entry in the trustee's book have been evidence against the obligor? If not, this is not evidence on the ground of duty. If it was the duty of the obligee, it was also the duty of the obligor to keep such an account. But surely

(a) *Williams v. East India Company*, 3 East, 192.

an entry made by the obligor, that he had given such a bond to the obligee for securing trust money, would not be evidence against the obligee; yet that is in the course of duty, and against the interest of the party, and never could, in any event, do him good. It is submitted, therefore, that, in this case, there was no duty for the non-performance of which the party was responsible; and not being so, the rule does not apply.

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Secondly—It is said that this is evidence as part of the *res gestæ*, and as an act contemporaneous with the execution of the bond; and the case of *Kent v. Lowen* (a) has been cited: but that was a very different case from the present. That was an action by the indorsee against the maker of a note. The defence was usury; to prove which, letters written by the payee, under whom the *plaintiff* claimed, negotiating for the bill on usurious terms, were offered in evidence. Lord *Ellenborough* held, “that they were equally admissible with an oral declaration;” of which there is no doubt. They were offered as evidence *against* the party claiming under the writer; here, *for* him. *Aveson v. Kinnaird* (b) is the leading case as to the admissibility of contemporaneous declarations. There an assertion of a wife was admitted *against*, not for the husband. That was an action by the husband on a policy of insurance on the life of his wife, and the evidence was held admissible for two reasons: 1st, To contradict a surgeon; 2ndly, That his opinion of her health being founded on her answers to questions, her other assertions, also, were admissible. There the evidence was admitted on the principle of necessity. If, here, *Atkin* had made the indorsement, the case might be different; it would be explanatory of his act in giving the bond, and the party taking the bond would know it. But suppose *Atkin* had, on the day of executing the bond, made an entry in a book of his own that the bond was given for trust money, would that affect *Gleadow*? If the thing is evidence as part of the *res gestæ*, it would affect him. There

(a) 1 Campb. 176.

(b) 6 East, 193.

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was nothing to shew that *Atkin* was a party or privy to the indorsement, it could not therefore be part of the *res gestæ* between him and *Gleadow*. Next, it was said that the indorsement might be read as an entry made against the interest of the party making it. But the class of cases establishing that point are wholly distinguishable from the present. They are exceptions out of another rule, *viz.* that hearsay is not evidence; and do not establish any exception out of the rule that a party shall not make evidence for himself. This appears clearly from *Higham v. Ridgway* (a), which is the leading case on this head, and where Mr. Justice *Bayley* says: "If a party, who has knowledge of the fact, make an entry of it, whereby he charges himself or discharges another, upon whom he would otherwise have a claim, such entry is admissible evidence of the fact after the death of the party, *if he could have been examined as to the fact in his lifetime.*" That principle is rightly stated. [*Bayley*, B.—The principle decided there was, that the midwife had peculiar means of knowledge, had no interest to misrepresent, and the entry was against his interest.] There the party could have been examined, if alive; and *Warren v. Grenville* (b) proceeded on the same ground. Now here, if this party had been alive, he could not have been examined; and if it would not be allowed as evidence on oath, much less ought it to be received *as a declaration* without oath. In the other cases the evidence was admitted, because they were declarations against the interest of the party at the time; and if the party had been alive, he might have been called as a witness, as in *Ivatt v. Finch* (c). Here, if the action had been by *Gleadow*, would it have been evidence that some person had heard him say the bond was given for trust money? It is apprehended not; but if so, the indorsement is no better, as it does not appear that the obligor ever saw it. There is only one instance where it has been held, that entries made by a person standing in the same situation as the party to the suit,

(a) 10 East, 122.

(b) 2 Str. 1129.

(c) 1 Taunt. 141.

could be received in evidence; and that was expressly on the ground that they never could be evidence for him, *viz.* entries by a deceased rector, which were held to be evidence for his successor. The cases of declarations against interest are not exceptions out of the rule that a party cannot make evidence for himself, but that hearsay is not evidence.

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The last class of cases to be noticed, namely, receipts of money indorsed upon bonds and notes are anomalous, not to be extended, and distinguishable from the present. There the indorsements were on the instrument, and in favour of the defendant, as well as against the plaintiff; and the instrument could not be enforced without shewing them and giving the defendant the benefit of them. *Outram v. Morewood*(a) shews that *Searle v. Lord Barrington* has never been approved of. [*Bayley, B.*—I happen to have discovered, by my own research, that evidence was given in *Searle v. Lord Barrington* of the time when the indorsements were made. It is not stated in the Reports. That not being stated may have been an objection made to the case.] The principle of that case is discountenanced by the Legislature in Lord *Tenterden's* act, as far as regards parol instruments, and it affords a good rule to apply to instruments under seal. Besides, it may be fairly assumed in that and the cases which have followed it, that the entry was made at the time of payment, and the party paying is assumed to have seen the entry made. In *Sanders v. Meredith*, the argument turned on the fact that the party paying the money was present when the indorsement was made. Mr. Justice *Parke* says: "The making the indorsement on the bond itself, in 1808, is an admission that the debt was a valid, subsisting debt, within twenty years. I rely not so much on the payment of interest as on this circumstance. They make no demand of the bond, the bond is not delivered up; but an indorsement is made

(a) 5 T. R. 12.

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on the bond." He relies on the indorsement being made in the presence of the party paying the money. On principle, the only way in which an indorsement is admissible in evidence, is as a declaration against the interest of the plaintiff, and in favour of the defendant, and made in the presence of the party paying the money. There is no case, from *Searle v. Lord Barrington* to the present time, in which it has been held that a parol declaration would be admissible, although in the terms of the indorsement. If not, it must derive weight from being on the bond. It can only be admissible on the ground that it is an act done *inter partes*, or in favour of the defendant as well as against the interest of the plaintiff. This may be said to be against the interest of the plaintiff, but it is not clear. If he has received the trust money, he is responsible whether he has taken security or not. The Court has decided that it was an improper security (a). Whilst the bond remained in his hands, it could not be given in evidence against him. [*Bayley, B.*—Suppose *Gleadow* died insolvent and his creditors claimed this money, could they have recovered it on this bond, in the face of that indorsement?] The money recovered by his executors will benefit his creditors, for it will exonerate his estate from the claims of the *cestui que trust*. [*Bayley, B.*—You are aware of *Middleton v. Melton* (b). I think that lays down this as a general proposition, that an entry by a man against his interest is evidence against all the world.] That was, like *Higham v. Ridgway*, an exception out of the rule against hearsay evidence.

Cur. adv. vult.

BAYLEY, B.—This was an action brought on a bond by the executors of *Gleadow* against the executors of *Atkin*; and the question was, whether an indorsement on the bond was admissible in evidence. The memorandum in ques-

(a) 2 C. & J. 548.

(b) 10 B. & C. 317.

tion declared, that the money, which was the subject of that bond, was trust money to be placed out by *Gleadow* and *Atkin*, as executors of the will of one *Cuthbert Thew*. There was no question here as to the effect of the indorsement. The only question was, as to its admissibility in evidence. There can be no doubt, upon looking at the bond, and at *Pybus's* testimony, that the indorsement existed either contemporaneously with the bond, or was executed about the same time. There is the same handwriting, the same blank for the date, the blank filled up and in the same hand. *Pybus* would not have put his name to it, had he not seen it signed. The Judge who tried the cause, had no doubt that it was signed long before the trial. I take the rule to be, that the declarations of a person having peculiar means of knowledge, having no interest to misrepresent, and making a declaration against his interest, are admissible in evidence after his death. This rule is supposed to be varied by *Higham v. Ridgway*, and I am there supposed to have used an expression which would be a qualification of the rule. The expression reported to have been used by me in that case is "if he could have been examined to it in his lifetime." That qualification is not introduced in any other case; but the rule is invariably laid down without any such qualification: and I have great doubts whether I ever used the expression. If I did, *Searle v. Lord Barrington* and *Bosworth v. Cotchett*, decided in the House of Lords, are against it. I have looked into *Starkie* and *Phillips*, who state the rule without the qualification. And in *Doe v. Robson* (a), and *Middleton v. Melton* (b), I lay down the rule without the qualification, as do the other Judges. My reason for doubting if I used the expression, is this, that having at that time abstracted *Roe v. Rawlings*, and having that abstract before me at the time when I was giving my opinion, I was not likely to have introduced a qualification not warranted by that

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(a) 15 East, 32.

(b) 10 B. & C. 326.

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decision. My entry of the case of *Roe v. Rawlings*, in my own note book, was, that the declaration of a person, who has peculiarly the means of knowing a fact, and has no interest in mistating it, is admissible after his death to prove that fact, and *a fortiori* would it be admissible if the fact were against his interest. When I afterwards came to abridge the case of *Higham v. Ridgway*, I find that I made the following entry: "An entry by a man who is dead, will be evidence as to strangers, if it relates to a fact peculiarly within his knowledge, if he had no interest in misrepresenting it, or if the entry either charges him with the receipt of money for a third person, or imports, that a debt, which would otherwise be due to him, is paid." There is not one single syllable in that entry as to the qualification that he could be examined in his lifetime.

The cases of *Searle v. Barrington* and *Bosworth v. Cotchett*, are decisions by the House of Lords, in point to shew that such an entry or such a declaration would be receivable in evidence on his behalf in a suit by him or his representatives. When the case of *Searle v. Lord Barrington* was mentioned here, I thought that the obligee had died within twenty years; but on looking into the case, as reported in *Brown*, I see it was the obligor. The only objection that I ever heard made to that case is, that it was supposed no extrinsic evidence was given of the indorsement being made within twenty years, and that was the ground of the division in the House of Lords. Lord *Hardwicke*, in *2 Vezey*, 43, approves of the case, assuming that the indorsement was made within twenty years; and it is an express authority that the indorsement is evidence for the party, or the representatives of the party, making it, the indorsement being, at the time of making it, against his interest. *Bosworth v. Cotchett*, decided in the House of Lords, was the case of a note and indorsement, and is in point. That case shews that the qualification, "if he could be examined in his lifetime," is not a part of the rule. For these reasons

I am of opinion, that the right and correct rule of evidence is as I have stated it; and that the declarations of a man against his interest, and having no interest to misrepresent, and made before the presumption of payment arises, are admissible in evidence. Upon this principle depends the admissibility of bailiffs' and receivers' accounts, which are evidence of a payment as charging the individual making it. *Warren v. Grenville* (a), and all the other cases, are bottomed upon this rule.

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VAUGHAN, B.—After the able and elaborate judgment delivered by my brother *Bayley*, I should have forborne to have given any opinion at length, had we not wished to express our opinion upon principle; and I feel no difficulty in so doing. *Searle v. Lord Barrington* is the fountain from which all other authorities upon this question flow in one uninterrupted channel. The simple principle is, that wherever a declaration is made against the interest of the party making it at the time, of a matter peculiarly within his own knowledge, and having no motive to misrepresent, it is receivable in evidence against third persons and all the world. The case is much stronger where there is reasonable ground to believe that the memorandum was contemporaneous with the execution of the bond, as here. It is impossible to read this indorsement without being satisfied of that being the fact. I by no means, however, rest my judgment on that circumstance, the inspection of it was peculiarly for the jury. It was argued, that the cases are founded on *Searle v. Lord Barrington*, and that that decision had been always carped at. But I should have liked to have been referred to some case where an exception has been taken to *Searle v. Lord Barrington*. Lord Chief Justice *Pratt*, it is true, disapproved of it; but he was the Judge who tried it at *Nisi Prius*. A fresh action was brought, and tried before Lord

(a) 2 Str. 1129.

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Chief Justice *Raymond*, who received the evidence; and a bill of exceptions having been afterwards tendered, it came before the Court of *Exchequer Chamber*, and ultimately before the House of Lords, and was there argued before eight Judges, three of whom were thought to be dissentient, and amongst them that able Judge Lord Chief Baron *Comyns*; but I should have been glad to have known the grounds of his opinion. It is not unimportant to see how this case was dealt with recently after the decision in the House of Lords. A case came on of *Turner v. Crisp* (a), 13 Geo. 2. There the Chief Justice refused to let in an indorsement of a receipt of part payment of a bond, made after the presumption of payment had arisen, saying, it differed from *Searle v. Lord Barrington*, as there the indorsement was made before the presumption had arisen. That case was, therefore, in perfect conformity with *Searle v. Lord Barrington*, and recognised that decision. Lord *Hardwicke* recognises the same distinction. The rule appears to be, that the instrument *appearing* to be made within the period may go to the jury to say if it be *really* so made. Fraud cannot be presumed. *Glyn v. Bank of England* (b) recognises *Searle v. Lord Barrington*. I consider the *dictum* of *Buller, J.*, in *Outram v. Morewood*, to be very strong; he says—"Evidence not upon oath is not admissible, except in the case of pedigrees and certain other excepted cases, or where the declaration is evidence against the party making it." Then came *Higham v. Ridgway*, in which it has been said, that my brother *Bayley* laid down the rule with this qualification—"if the party could have been examined in his lifetime." This is most probably an error of the reporter's. It is not put as a point by him—at most it is only an additional reason; and the other Judges say nothing of the kind. In *Doe v. Robson* (c), Lord *Ellenborough* puts it on this principle, that there was a total absence of interest in the persons making the entries to per-

(a) 2 Str. 827.

(b) 2 Ves. 43.

(c) 15 East, 32.

vert the fact, and at the same time a competency in them to know it. And Mr. Justice *Bayley* puts it thus—"that if a party, who has knowledge of the fact, make an entry of it, whereby he charges himself, or discharges another upon whom he would otherwise have a claim, such entry is admissible in evidence of the fact, because it is against his own interest." So that Mr. Justice *Bayley* there lays down the rule without the qualification. The case of *Higham v. Ridgway* came under the consideration of the Master of the Rolls, Sir *Thomas Plomer*, in *Short v. Lee* (a), and he there comments on this supposed qualification; and, after referring to Mr. Justice *Bayley's* subsequent judgment in *Doe v. Robson*, lays down the rule without the qualification. No man ever gave more elaborate judgments than Sir *T. Plomer*; and he says—"These documents possess those qualifications which always make the declarations of deceased persons evidence, namely, that they were persons having a competent knowledge, or whose duty it was to know, having no motive to make a false representation, and their written declarations being directly at variance with their own interests. Such declarations are *universally evidence*;" and *Roe v. Rawlings* is there referred to. I do not understand my brother *Bayley* as laying down a rule in *Higham v. Ridgway*, but merely as relying on the additional circumstance, that, if alive, the party might have been examined as a witness; but that was never intended to be insisted on as an essential ingredient. These cases came before the consideration of the Court again in *Middleton v. Melton* (b); and Mr. Justice *Bayley* there never adverts to this qualification; and Mr. Justice *Parke* there says—"The question is, whether entries in a private book, acknowledging that he had received certain sums of money, are, after the death of the party who made them, admissible evidence against third persons to prove the fact of the receipt of the money. This case

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(a) 2 Jac. & Walk. 489.

(b) 10 B. & C. 327, 328.

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falls within the exception necessarily engrafted on the general rule, which requires testimony on oath, viz. that an admission of a fact made by a deceased person, which is against the interest of the party making it at the time, is evidence of that fact as between third persons;" and he further adds—"But I think those decisions may be supported on the general principle, that an entry made by a party cognizant of a fact, and having no interest to make a false entry, whereby he charges himself with the receipt of a sum of money, is evidence of the fact of the receipt of such money." I do not find then, from the cases, that *Searle v. Lord Barrington* has been discountenanced by the profession, or that it is not deserving of attention, nor why it should be looked upon with suspicion. Nor does Lord *Tenterden's* act affect the question. It does not apply at all to *bonds*. That act followed, probably, in consequence of *Bosworth v. Cotchett*. I was of counsel in that case; and it was contended, that unless evidence was given, extrinsic of the note, to shew when the indorsements were made, they could not be received in evidence. It does appear to me a plain and simple proposition, that where a party who has no motive to misrepresent, and who is peculiarly cognizant of the fact, makes a declaration against his interest at the time of making it, such declaration is receivable in evidence. I do not proceed on the appearance of the bond. But can any one say, on looking at it, and at *Pybus's* evidence, that it was not a contemporaneous act? It is a strong circumstance with me, that this indorsement was made in the performance of a duty, and I think it is entitled to great weight; but, as I said before, I do not found myself on that; I wish to give my decision on general principles.

BOLLAND, B.—I was not present during the whole of the argument, and, therefore, shall not give any opinion.

GURNEY, B.—If I were to go over the cases, I should

only repeat what has already fallen from the Court. I can only say that I entirely concur. The rule is well summed up in 1 *Phillipps on Evidence*, 255. The present case falls within every branch of it.

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Rule discharged.

PARKS v. EDGE.

ASSUMPSIT on a bill of exchange, by the indorsee against the indorser. The declaration stated that one *Samuel Southgate*, on &c., at &c., made his bill of exchange in writing, and directed the same to one *John Harvard*, and thereby required the said *John Harvard* to pay to his order 59*l.* 10*s.* 1*d.*, thirty months after the date thereof, which period had then elapsed; and that the said *Samuel Southgate* then and there indorsed the said bill to the said defendant, and the said defendant then and there indorsed the same to the plaintiff; and that the said *John Harvard* did not pay the said bill, although the same was presented to him on the day when it became due; of all which the defendant then and there had due notice.

Where, in a declaration on a bill of exchange, it was stated, that the bill was drawn by *S. S.*, payable to his order, and the bill when produced in evidence was payable to the order of *T. E.*:—Held, that the Judge had rightly exercised his discretion, in allowing the record to be amended under 9 *Geo. 4*, c. 15.

Quære—

Whether the Court in banc has any right to revise the opinion of the Judge at *Nisi Prius* in directing such amendment.
Semble—not.

In a declaration by indorsee of a bill against indorser, it is not necessary to allege a special acceptance at a particular place, or a presentment at such place.

It is sufficient to state a general presentment to the drawee,

At the trial, before *Bolland*, B., at the *London*ittings after last *Michaelmas* Term, the bill when produced in evidence was as follows:

“ 59*l.* 10*s.* 1*d.*

London, March 25, 1828.

Thirty months after date, pay to the order of Mr. *Thomas Edge*, fifty-nine pounds ten shillings and 1*d.*, value received.

To Mr. *John Harvard*, &c.,

Samuel Southgate.”

“ Accepted,

Indorsed.

Payable at 8, *Cloak Lane*, *Cheapside*.

“ *Thomas Edge*.

John Harvard.”

Henry Parks.”

without stating any acceptance, and to prove the presentment at the particular place pointed out by the acceptance.

... accordingly, to attack the ver-
 ... First, under the 3 Geo. 4 c.
 ... was not justified in making the
 ... a variance in substance, and not
 ... *Attwood v. Smith* (a), Lord Tenter-
 ... second to be amended. *Spring* - I
 ... in amendment. It is the duty
 ... that has been that be conducted
 ... Here is gross negligence; and laxity
 ... has in my opinion done more
 ... in *Self v. Oriel* (b), the same learn-
 ... from that act of Parliament was,
 ... Now,
 ... who could make, who would
 ... I have always thought we have gone
 ... for the purpose of attaining
 ... the consequence of which
 ... in some particular case; the consequence of which

(1813) 1 M. & M. 135

(a) 4 G. & P. 22.

has been, that these cases have been quoted as precedents, and great laxity has been introduced into practice." The discretion of the Judge is confined, within the terms of the act, to clerical errors, and ought not to have been exercised here. In *Webb v. Hill* (a), Lord Tenterden says, "This is nothing like a mere mistake in setting out a written instrument; it is the allegation of matter totally different from that offered in evidence." Here, the allegation and proof are substantially different. [*Bayley, B.*—So it would be in every variance where an amendment was required.] But this is a substantial variance in the substance and not in the form merely. [*Bayley, B.*—The defendant knew whether he had indorsed more than one bill of that date and amount.] It is submitted that the real cause of action is not shewn on the face of this declaration.

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Secondly—This bill is accepted payable at No. 8, *Cloak Lane, Cheapside*; but in this declaration there is no allegation that it was so accepted, nor is it alleged in the declaration that any presentment was made at that place. In *Gibb v. Mather* (b), which was an action brought by the indorsee against the drawers of a bill of exchange, the acceptance was as follows:—"Accepted, at Messrs. *Jones, Lloyd & Co., Bankers, London.*" At the trial it was objected, that the plaintiff, in order to charge the drawers, ought to prove a presentment of the bill at the bankers' mentioned in the acceptance; but Mr. Justice *Parke*, who tried the cause, overruled the objection, and directed the jury that such proof was unnecessary. A bill of exceptions having been tendered, the question was argued before the *Exchequer Chamber*, and the Court was of opinion, that, notwithstanding the 1 & 2 *Geo. 4*, c. 78, s. 1, in order to charge the drawer, a presentment of the bill at the bankers' was requisite. And *Tindal, C. J.*, in delivering the judgment of

(a) 1 M. & M. 255.

(b) 2 Cr. & Jer. 254.

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the Court, observed, that "the doubt which had been formed (a) was confined to the case where the question arose between the *holder and the acceptor*. In cases between the indorsee and the drawer, upon a special acceptance by the drawee, no doubt appeared to have existed but that a presentment at the place specially designated in the acceptance was necessary to make the drawer liable upon the dishonor of the bill by the acceptor." [*Bayley, B.*—Was it proved in this case? The allegation does not signify. You are not bound to state the acceptance, but only to prove such a presentment as the real acceptance required. In *Gibb v. Mather*, no presentment at the particular place was proved. In the ordinary action, you state that the bill was duly presented to J. S. You are not bound to state the place where it was presented.] It is submitted, that this, as against the indorser, is a special acceptance; and, therefore, that it was necessary to allege and prove a presentment at the particular place, to make the indorser liable.

BAYLEY, B.—The 9 *Geo. 4*, c. 15, provides, that it shall be lawful for any Judge sitting at *Nisi Prius*, and any Court of *oyer and terminer*, &c., if such Court or Judge shall see fit so to do, to cause the record in which any trial shall be pending before any such Judge or Court in any civil action, &c., when any variance shall appear between any matter in writing or in print produced in evidence and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the Court, on payment of such costs (if any) to the other party, as such Judge or Court shall think reasonable;" that, therefore, gives a discretionary power to the Judge at *Nisi Prius*. In this case an action is brought on a bill of exchange, which was indorsed by the defendant to the plaintiff.

(a) i. e. before the passing of the 1 & 2 *Geo. 4*, c. 78.

That bill is misdescribed in the declaration: it is a bill payable to the order of *Edge*; but, in the declaration, it is described as a bill payable to the order of *Southgate*; still, *Edge*, in point of fact, is the person who indorses the same bill to the plaintiff. The question is, whether the Judge exercised a sound discretion in directing an amendment so as to make the statement agree with the fact, consistently with the justice of the case. I entertain great doubt, whether it is not exclusively for the discretion of the Judge; and, at present, I am of opinion, that it is not competent for this Court to revise the discretion of the Judge. But, conceding that we should be warranted in so doing, in my opinion the discretion was here rightly and properly exercised. No doubt there was a bill of exchange which corresponded in date, in amount, and in the name of the drawer, and which was indorsed by the defendant to the plaintiff. If there had been two bills of the same date and amount, and corresponding in the name of the drawer, and indorsed by the defendant, he might have proved that, in opposition to the amendment; and, upon such proof, I, sitting at *Nisi Prius*, should have said, this is a case in which two bills were indorsed by the defendant to the plaintiff, and the action is brought on the other bill, and I should have refused the amendment; but, as there is here no such suggestion, and it is palpable that this was a mistake only, which does not interfere with the justice of the case, I think the discretion was properly exercised. The case of *Jelf v. Oriel* was a decision of Lord *Tenterden's* at *Nisi Prius*, and was a very different case from this. There the bill was described on the face of the declaration as accepted payable at Sir *James Esdaile's & Co.*, Bankers, London, or at No. 18, *Poland Street, Oxford Street*; when, in point of fact, the bill, as originally accepted, was accepted payable at Sir *James Esdaile's & Co.*, Bankers, London, and the other part had been added subsequently, and not by the acceptor. This was a very material difference, as that altera-

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tion might have been the subject of a criminal prosecution; and I cannot say, that, where there is an alteration which would have amounted to forgery, the Judge did wrong in refusing to allow the amendment. Then, as to the objection, that it was incumbent on the plaintiff to allege in his declaration a presentment at the particular place, No. 8, *Cloak Lane*—the plaintiff is bound to prove a presentment, but the manner and place of presentment are matter of evidence. It is not necessary to state an acceptance, whether general or at a particular place, against any party except the acceptor; and, therefore, a plaintiff who declares without stating an acceptance by the drawee, cannot be bound to state on the record such a presentment as the real acceptance requires. It is merely matter of evidence, and the proof of the presentment at the particular place pointed out by the drawee is evidence of the general presentment alleged in the declaration. I think that on both points this rule ought to be refused.

VAUGHAN, B.—I avoid giving any decided opinion as to the jurisdiction of this Court to revise the opinion of the Judge at *Nisi Prius*, but it appears to me a question purely in the discretion of the Judge. This is a very salutary act of Parliament. In this instance, the discretion appears to me to have been properly exercised. On the other point, I agree with my learned Brother.

BOLLAND, B.—I continue of the same opinion as at the trial. *Jelf v. Oriel* is distinguishable, for the reasons which have been given. It was not suggested that there was any other bill, and I therefore thought, that, in allowing this amendment, I was only furthering the justice of the case. The objection that there ought to have been an allegation of a presentment at the place named in the acceptance was not much pressed. It was not necessary that there should be an allegation that the bill was accepted payable at

8, *Cloak Lane*, or that it was presented there. The bill *Exch. of Pleas, 1833.*
 was *proved* to have been presented at the place.

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GURNEY, B., concurred.

Rule refused.

FORBES v. GREGORY and Others.

CASE for libel. The declaration contained sixteen counts. All the defendants, excepting three, pleaded the general issue to the whole declaration; two of them demurred jointly to the fifth and eleventh counts, and pleaded not guilty to the remainder of the declaration; and another defendant demurred separately to the same counts, and pleaded not guilty to the remainder of the declaration.

Some of many defendants demurred to some counts of a declaration, and pleaded not guilty to the remainder; and the rest of the defendants pleaded not guilty to the whole:—*Held*, that the defendants who demurred, could not, after obtaining judgment in their favour on the demurrer, tax their costs upon that judgment.

In the course of this term, the demurrer came on to be argued, when the Court gave judgment for the defendants.

The attorney for the three defendants, then gave two separate rules for judgment upon the demurrer, and served two separate bills of costs on the judgments of demurrer, with two separate notices of taxing costs.

Mansel moved for a rule to shew cause why the notices of taxing costs should not be set aside, and all proceedings thereon stayed. He cited *Astley v. Young* (a), and *Parton v. Stanning* (b), as proving, that, where an issue as to part only of the plaintiff's demand, either in law or in fact, is found for the defendant, he is not, upon such finding, entitled to costs. In the present case, the plaintiff might succeed on the trial against all the defendants upon the other parts of the record, or against the defendants who had not demurred upon the whole record, as the part de-

(a) 2 Burr. 1232.

(b) 5 East, 261.

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murred to might be good after verdict; at all events, the defendant was premature in attempting to tax his costs at present, as the rule of *Hilary Term, 2 Will. 4 (a)* only enables the defendant to deduct costs of issues found for him out of the plaintiff's costs (*b*).

The Court, after taking time to consider, granted the rule; against which—

Hutchinson shewed cause, but the Court made the—

Rule absolute.

(*a*) R. 74. No costs shall be allowed, on taxation, to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs.

(*b*) It was also suggested, that the 8 & 9 *Will. 3*, c. 11, does not apply to actions on the case. That is true as to the first section, but not as to the second, which is the section in question.

LINLEY and Others v. CLARKSON.

An agreement to pay rateably and proportionably according to the sums of money severally subscribed by us and set opposite to our respective names, was signed by the defendant and nearly two hundred other persons, who wrote in figures the sums subscribed by them opposite their names, these sums being, with a few exceptions, guineas. The words of the agreement, including the signatures and sums as far as the defendant's inclusively, amounted to less than 1080; and the words of the agreement, with all the signatures without the sums, amounted to less than 1080 words; but including the signatures, the words amounted to more than 1080:—*Held*, that a single 14 stamp was insufficient.

ASSUMPSIT on an agreement by the therein-named committee against one of the subscribers. The agreement, after reciting that Sir *William Pilkington* and others, owners of the *Wakefield* soke mills, together with their lessees, were about to file a bill or bills in the duchy court of *Lancaster*, or commencing one or more action or actions, suit or suits, against some one or more of the resiants, tenants, or inhabitants of and within the township of *Aberthorpe* with *Thornes*, in the county of *York*, for having in

his possession and making use of one or more mill or mills, engine or engines, for the purpose of grinding corn, grain, and malt, used and consumed in their dwelling-houses, or for having used and consumed in their said dwelling-houses corn, grain, or malt, not ground at the said soke mills; and also reciting that the said resiants, tenants, and inhabitants had a right to keep in their possession and make use of any engine or mill for the purpose of grinding corn, &c. for sale, or to be consumed in their dwelling-houses. Now, they whose names were thereunto subscribed, being severally inhabitants, resiants, or owners of estates of and within the township of *Aberthorpe* and *Thornes* aforesaid, in order to resist the claim of the said Sir *William Pilkington* and others, their lessees, did thereby nominate and appoint *David Linley* and others therein named, to be a committee to defend, conduct, and manage any suit or action, &c., that should be brought as before mentioned; and they, the said subscribers, did thereby, for themselves severally and respectively, and for their several and respective executors, &c., promise and agree to and with the said committee, their executors and administrators, that they and each of them, and their and each of their several and respective heirs, executors, &c., should and would from time to time, when thereunto requested by the said committee, pay to them on demand their several and respective *shares, parts, and proportions* of all bills for fees, costs, charges, damages, and expenses which should or might be by them incurred, or which they might bear, pay, or sustain, &c., for or on account of defending any such suits as aforesaid, or anything relating thereto until the final determination thereof, "*rateably and proportionably according to the sums of money severally subscribed by us and set opposite to our respective names.*" And they thereby authorized and empowered the said committee, or the major part of them, to demand, collect, sue for, and receive

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the same accordingly. This agreement was signed by the inhabitants, resiants, and owners, to the number of nearly two hundred, with different sums in figures opposite their names.

At the trial before *Parke, J.*, at the last summer assizes for the county of *York*, the agreement was produced in evidence, stamped with a 1*l.* stamp, upon which it was objected that it ought to have been a 1*l.* 15*s.* stamp, as the agreement with the signatures and sums contained more than 1080 words. The learned Judge overruled the objection, and the plaintiffs had a verdict, with leave to the defendant to move to enter a nonsuit on the above and several other grounds, which it became unnecessary for the Court to decide upon.

Jones, Serjt., obtained a rule accordingly, against which—

Alexander and *Wightman* now shewed cause.—The objection here is, that a stamp of 20*s.* was not sufficient. The 55 *Geo. 3*, c. 148, directs, (schedule, part 1), that, where any agreement shall not contain more than 1080 words, (being fifteen common law folios), the stamp shall be 1*l.*; and, where the same shall contain more than 1080 words, 1*l.* 15*s.* In this case, such part of the agreement as, it is submitted, it was necessary to give in evidence, was less than that number of words. The agreement, including the first signature, contained only nine folios, and including all the signatures as far as the defendant's inclusive, and every sum set down as far as the defendant's signature, it only contained twelve folios and thirty-three words; and it is submitted that is sufficient. [*Bayley, B.*—Must you not take into account all the signatures in order to settle the proportions to be paid?] The question is, whether the agreement was valid when signed by the present defendant. At the time the agree-

ment was so signed, it was a perfectly good and valid instrument; and it is difficult to see how, by any act not done by the party signing, it can be rendered invalid. [*Bayley*, B.—You must look to all the names and all the sums to see the amount for which each of the parties is liable.] The only signature proved at the trial was the defendant's.

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BAYLEY, B.—Ought you not to have proved all, as by the agreement you were only liable to pay an aliquot proportion. I cannot ascertain the amount of your aliquot proportions without reading all the signatures. Then, are not the signatures from first to last to be read, in order to see how much you ought to be called upon to pay? The difficulty is, you must refer to the sums to see what is due from the defendant.

The other Barons concurred, and the—

Rule for a nonsuit was made absolute.



BARLOW v. RHODES and Another.

THIS was an action of trespass for breaking and entering the plaintiff's close, and pulling down his wall, at *Wetherby*, in *Yorkshire*. The defendants pleaded several special pleas, of which only the third and seventh were relied upon at the trial. The third plea justified the trespasses, under a claim of a right of way over the *locus in quo*, under a grant from the *Duke of Devonshire*, when owner

The words "with all ways, thereto belonging, or in anywise appertaining," in a conveyance, will not pass a way not strictly appurtenant, unless the parties appear to have intended to use those words in a

sense larger than their ordinary legal sense.

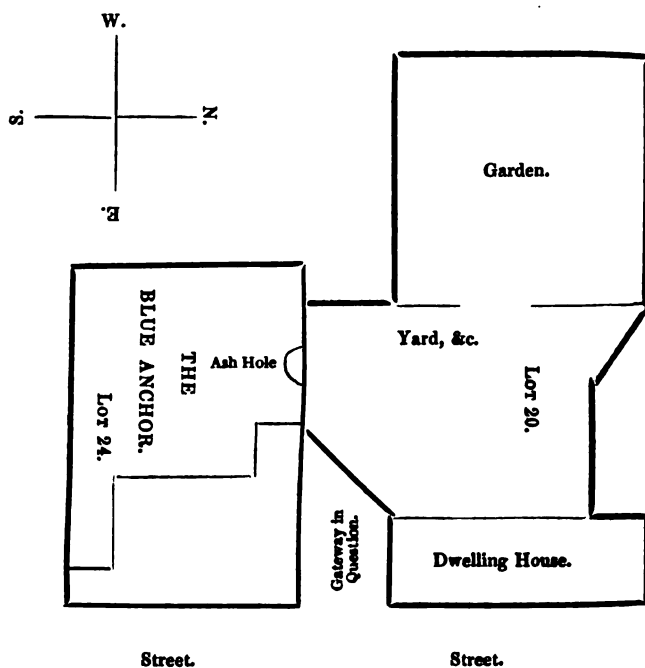
Quære—Whether such intention can be collected from any thing *dehors* the deed, as, from a plan of the premises marked on particulars of sale referred to in the deed. *Semble*—Not.

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in fee. The seventh plea claimed a right of way of necessity. The replications traversed these rights.

It appeared upon the trial before *Bolland, B.*, at the last Summer Assizes for the county of *York*, that the *Duke of Devonshire*, being the owner in fee of the town of *Wetherby*, put it up to sale by auction, in lots, in *October, 1824*. At that sale, a *Mrs. Dawson*, under whom the defendants claimed, became the purchaser of the *Blue Anchor* public-house and back premises, being lot 24; and the plaintiff became the purchaser of lot 20, consisting of a dwelling-house fronting the street, with a yard, back premises, and garden behind. In lithographed plans exhibited at the sale, the gateway between the two properties towards the street, and over which the right of way in question was claimed, was excluded from both lots by strong black lines, as in the subjoined plan :



The Duke conveyed the *Blue Anchor* to Mrs. Dawson in fee, by indentures of lease and release, dated the 12th and 13th April, 1825, together with "all ways, roads, rights of road, paths, passages, &c., to the said hereby conveyed premises, or any part thereof, *belonging, or in anywise appertaining.*" This conveyance was registered the 28th June, 1825. By indentures of lease and release of the 25th and 26th May, 1825, the Duke conveyed to the plaintiff in fee, the messuage, yard, garden, &c., forming lot 20, and also the gateway in question, by the description of "the road and gateway, and the ground and soil thereof, at the south end of the messuage, excluding all other persons from every right whatsoever in, to, or over the same road, gateway, and ground, and every part thereof." This conveyance was registered the 16th January, 1826. It further appeared at the trial, that Mrs. Dawson, at the time of the sale and conveyance, was tenant to the Duke of the whole of lot 24; that a part of that lot, at the north-east corner of the *Blue Anchor*, next to the gateway (which at that time was used by Mrs. Dawson as a kitchen to the *Blue Anchor*, Mrs. Dawson having made an internal communication between them when she became occupier of the whole), had been formerly occupied by an under-tenant as a cottage and distinct tenement; and that such separate occupation was put an end to in 1818 or 1819, under a general order from the Duke against under-tenancies. The gable end of the *Blue Anchor* had no door or window into the gateway, but the cottage or kitchen had a door into the gateway, and the tenants used the road from that door down the gateway into the street, particularly while that part of the property was occupied as a separate tenement, the gateway being then the only way to it. There was also an ash-hole behind the cottage or kitchen; and the tenants of the *Blue Anchor*, and of the cottage, while it was a distinct tenement, used the gateway as a road to

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the ash-hole for the purpose of depositing their ashes, but nothing separated the ash-hole from the rest of the yard behind the *Blue Anchor*. The plaintiff's counsel objected to the plans being received in evidence to explain the conveyances; but the learned Judge admitted them, subject to the objection. He was of opinion that the defendants had failed in proving a right of way by an implied grant, or of necessity; and the jury, under his direction, found a verdict for the plaintiff.

Pollock, in the course of last term, obtained a rule for a new trial, against which—

Coltman and *Tomlinson* now shewed cause.—The right of way, by necessity, is out of the question, as the defendants' premises abut upon the street. Then, the only question is, whether the way claimed can pass under the general words in the deed 'belonging or in anywise appertaining.' All the authorities shew that these words can only pass easements which are strictly appurtenant, and do not extend to pass a way which may have been used, but is not, in point of law, appurtenant. If it had been intended that all ways ever used with the premises should pass, the conveyancer would have inserted the words "or therewith used and enjoyed." In *Grymes v. Peacock* (a), a house and land were granted for a term of years, with all commons appurtenant to the said messuage and land; and it was held, that a right of common, which had been used in the waste of the owner, did not pass; and *Flemming*, C. J., said—"If it had been laid with all commons, profits, and used, occupied, and enjoyed with the tenement, this had been good." In *Saundeys v. Oliff* (b), the same distinction was taken, and it was decided that a right of common which was extinct (by unity of posses-

(a) 1 Bulstrode, 17.

(b) Moore, 467.

sion (a)) could not pass by the words "*de common appurtenant et spectant al messuage, mes tous commons usualment occupies ove le messuage voiloit aver passe autiel common.*" So, in *Bradshaw v. Eyre* (b), a common had been extinguished by unity of possession; and the land to which &c., was then demised, with all commons, profits, and commodities thereto appertaining, *vel occupat. vel usitat. cum prædicto messuagio*; and the question was, whether the common was revived, or whether it may not enure as a new grant of common for so many years. It was held clearly that the common was extinguished by unity of possession, it being common appurtenant, and could not be revived again. But it was also held, that, by the words of the lease 'of all commons, &c. occupied or used therewith &c.,' it is a good grant of a new common. So, in *Worledg v. Kingswel* (c), the grant was *communiarum quarumcunque dicto messuagio spectant. sive in aliquo modo pertinent. vel cum eodem messuagio dimisso usitat.*, and it was held a new grant of the common. *Whalley v. Thompson* (d) and *Clements v. Lambard* (e) are also authorities in point. In *Harding v. Wilson* (f) it was said, by *Holroyd, J.* — "Again, the under-lease describes the ground demised, and the ways granted, by the words, 'all ways thereunto appertaining.' The road in question being over the soil of the original lessor would not pass by those words. Leases usually contain the words *heretofore used*, by which such a way would pass." In *Kooystra v. Lucas* (g), the way passed by the words therewith

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(a) Used here, and frequently, for unity of ownership. "Unity of possession is generally an incorrect expression used for unity of ownership; unity of possession only suspends the easement:" *per Bayley, B.*, in the principal case: and see the same remark by the

learned Baron in *Canham v. Fisk*, 2 C. & J. 126.

(b) *Cro. Eliz.* 570.

(c) *Id.* 794.

(d) 1 B. & P. 371.

(e) 1 Taunt. 205.

(f) 2 B. & C. 100; 3 D. & R. 287.

(g) 5 B. & A. 835.

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used and enjoyed. The passages from *Com. Dig.* (a), which are cited in the note to *Kooystra v. Lucas*, were relied on by the defendants' counsel in moving for this rule. It is there said, that, "if a man, seised of *Blackacre* and *Whiteacre*, uses a way through *Whiteacre* to *Blackacre*, and afterwards grants *Blackacre*, with all ways, &c. (b), this way through *Whiteacre* shall pass to the grantee.' That passage, however, leaves the question in this case untouched, for it does not appear what is the meaning of the &c., and upon that the question turns. *Morris v. Edgington* (c) will probably be relied on by the other side. That was the case of a way of necessity. The demise was of that part of the premises called the *Bear and Ragged Staff*, on the west side of the gateway of the premises, and so much as extended over the gateway, and a room or apartment adjoining the gateway on the east side thereof, then lately used as a kitchen to the said messuage, but then converted into a tap-room, and the cellar below the same. The question was on the right of way to the tap-room. No way was granted in express terms; but, as the tap-room was insulated from the other parts of the premises demised, there was no access to it without a way of necessity. The struggle between the parties was, whether the one or the other way passed as a right of way by necessity. There being a choice of two ways of necessity, the most convenient was held to pass. [Lord *Lyndhurst*, C. B.—In modern deeds, the words 'therewith used and enjoyed' are generally inserted, because conveyancers find that the words 'appertaining and belonging' are not sufficient. There is a particular legal sense of the word

(a) Title *Chimin*, (D 3.); and in 6 Modern, 3.

(b) In the note in 5 B. & A. 835, the &c. is omitted. In the passage referred to in 6 Mod. 3, the expression is with all ways

easements, &c. In the abstract of the pleadings, page 1, *Id.*, it is stated, with all lawful ways, &c. thereunto belonging, not using the word 'appertaining.'

(c) 3 Taunt. 24.

‘appertaining,’ in which it must be taken, unless there is something to shew that it has been used in a different sense. That seems to be the result of the case of *Morris v. Edgington*.] There is nothing to shew such intention in this case. The only difficulty is, that it is said that there was nothing to satisfy the words ‘with all ways there-to appertaining or belonging.’ It would, however, be very dangerous to argue from the general words of a conveyance. In the present case there is nothing to satisfy the word ‘watercourses,’ which also occurs in this conveyance. In *Clements v. Lambard* there was no right of common appurtenant. There are few conveyances where there are not general words which are not satisfied. They are inserted to meet every right which may exist; but it would be highly dangerous on such grounds to depart from the usual legal construction.

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Pollock and Hoggins, contra.—It was clearly intended that the defendant should have this right of road when he bought his lot, and it was fraudulently added to the plaintiff’s lot. *Morris v. Edgington* very nearly resembles this case, and is in the defendants’ favour. Lord C. J. *Mansfield* says, in that case—“All deeds are to be most strongly taken against the maker, and all deeds and writings are to be taken *secundum subjectam materiam*. Now, what is the case here? There is no way that we hear of at all belonging to these premises, except the way over the land in question. Now, as we hear of no other ways, and as it is impossible that these parties, who are supposed necessarily to understand the law, could suppose these ways were ways appurtenant, they therefore meant them, being the only subsisting ways, by the improper name of ‘ways appurtenant.’” The words in the conveyance, in the present case, are, ‘as the same is now staked and marked as lot 24 in the particulars of sale.’ That reference makes the particulars a part of the conveyance. [*Bayley, B.*—Is there any au-

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thority for saying that we can refer to a plan not a part of the deed. In *Morris v. Edgington* the right of way would have passed as a necessary way without any words of express grant of right of way. Lord *Lyndhurst*, C. B.—In that case, it was of necessity, according to the argument of Chief Justice *Mansfield*, that the word ‘appertaining’ should receive the construction there given to it; but that necessity was collected from the face of the deed itself. If you can shew from the deed itself that the word ‘appurtenant’ should have a different sense from its ordinary legal sense, you may do so; but can you go out of the deed for that purpose? *Bayley*, B.—Have you any authority to shew that you may refer to a plan not being a part of the deed? No authority is necessary to establish a proposition so clear as that you may refer to a plan to which the deed itself refers. It is very usual in a policy of insurance to refer to a declaration thereafter to be indorsed; and when such declaration has been indorsed, it is every day’s practice to refer to it, just as if it had been a part of the original instrument. The authorities shew, that, if the words ‘heretofore used therewith’ had been inserted, the case would have been clear; but, it does not follow that the right of way may not pass without these words. The word ‘belonging’ is used in the present case. [Lord *Lyndhurst*, C. B.—Has not the word ‘belonging’ always been construed as having the same sense as the word ‘appertaining’ when it immediately precedes or follows it? In almost all the cases which have been referred to, the word ‘belonging’ occurs as well as ‘appertaining;’ and the argument you are now using would have been applicable in those cases.] ‘Belonging’ is not so technical a word as ‘appertaining.’ It is difficult to give to the word ‘belonging’ a different meaning from that of the words ‘therewith used.’ At all events, the judgment of the Lord Chief Justice, in *Morris v. Edgington*, is decisive that the word ‘appurtenant’ is not neces-

sarily confined to its strict legal sense, but is capable of a larger signification, when the parties have not intended to use it in its legal sense; and it is submitted, that the plan, and the other circumstances of this case, shew that it was used in this deed in the more extended sense.

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LORD LYNTHURST, C. B.—The question in this case turns on the meaning of the words ‘appertaining’ and ‘belonging.’ The message is conveyed, ‘together with all ways, roads, rights of road, paths and passages to the said hereby demised premises, or any part thereof, belonging or in anywise appertaining.’ The word ‘belonging,’ and the word ‘appertaining,’ I consider to be, as here used, synonymous; and it is quite clear, that the way which is claimed is not appurtenant to the message, in the ordinary legal sense of the word ‘appurtenant.’ From the case of *Morris v. Edgington*, it should appear that the word may receive a more extensive construction where you collect from the deed itself that such was the meaning of the parties; and, looking merely at the deed itself in that case, it was quite clear that the parties there did not intend to use the word in its strict legal sense. There is nothing, however, in the conveyance in the present case, from which I can collect that the parties have intended to use the words in other than their usual legal meaning. It has been urged upon us, that we may look at the plan which accompanied the particulars of sale. Now, without deciding whether or no we can look at the plan for the purpose of enabling us to give a different construction to these words, it is sufficient for me to say, that, looking at the deed and plan together, I am not satisfied that the words were intended to be used in any other than their ordinary legal sense. As I am not satisfied that the parties used these words in any other sense, I conceive myself bound to give them their ordinary legal meaning; and I am, therefore, of opinion, that the defendant did not make out his justi-

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fication, and, consequently, that this rule should be discharged.

BAYLEY, B.—I am of the same opinion. It has been decided over and over again, that where an easement has become extinct by unity of ownership, and the owner wishes to grant the easement with the premises, to which it was formerly appurtenant, he must use language to shew that he intended to create the easement *de novo*. If you convey the close, with all ways thereto belonging and appertaining, the easement will not pass, except in a case of a way of necessity, where such right of way would pass without any words of grant of ways. That was decided in *Grymes v. Peacock*, where the right of common was extinguished by unity of ownership. If, in the case of an easement extinguished by unity of ownership, a man grants the land, to which, before the extinguishment, the right of common was attached, and uses only the words ‘appertaining’ and ‘belonging,’ the right will not pass, these words not being sufficient to revive the right. There are, however, apt words for the purpose of passing such an easement; and, if you will only insert the words ‘or therewith used and enjoyed,’ the right would pass. It has been said at the bar, that there is a distinction between ‘belonging’ and ‘appertaining;’ it is the first time I have ever heard of such a distinction; and, in all the cases referred to, where these words have occurred, the Courts have uniformly considered them as having the same meaning. It has been said also, that we are at liberty, in this case, to refer to the plan on the particulars of sale, for the purpose of aiding us in our construction of this deed. I will not speak with certainty on this point; but, my present impression is, that we cannot look *dehors* the deed. If I were at liberty to refer to the plan, I should be of opinion, that no intention appears to use the words in a different sense from their ordinary legal one. [The learn-

ed Baron then described the premises from the plan.] I should consider this as a plan describing the premises in their then state; but, it appears to me, that it would be a most forced construction to say, that it was intended to continue a right of way through the opening. If the party means to grant a way, which is not essential to the enjoyment of the premises demised, he must use the proper and apt words for such purpose. In this case such a way was not essential to the enjoyment of the premises demised. [The learned Baron then stated other reasons for not thinking that the intention of the parties was as contended for on behalf of the defendant.] We have been pressed with the case of *Morris v. Edgington*. I consider that merely as a case of a way of necessity, and not as a case properly requiring the construction of the words 'belonging' and 'appertaining;' because, if there had been no such words, the law would have implied the way in question, on the principle, that where you grant property, you grant the right of access to that property. There were two ways of getting into the yard in question in that case. One or other was essential to the use of the tap-room as a way of necessity. There being only two ways, and one way being necessary, all that the Court of *Common Pleas* had to decide was, to which of the two was the plaintiff entitled. Now, one was a more natural and convenient way than the other, and that was therefore determined to be the one which the plaintiff was entitled to use. That case not appearing to me to apply to the present, and a current of authorities settling the legal construction of the words in question, I am of opinion that we are bound to construe these words according to their ordinary legal sense; and, therefore, that this rule should be discharged.

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BOLLAND, B.—I remain of the same opinion as at the time of the trial. It appears to me, that we are to look to the words of the conveyance only, and to say, whether we

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can give them a different interpretation from that which they ordinarily bear in legal instruments. In *Morris v. Edgington* a larger interpretation than usual was given to these words; but that was because it was clearly the intention of the parties. In this case I look at the conveyance and find merely the words usual in all conveyances. We have been pressed to go out of the deed. Even if it were conceded to the defendant, that he has a right to avail himself of the plan, which right I very much doubt, I think that he would derive no benefit from it. [The learned Baron then stated his reasons for thinking that the plan and deed taken together did not warrant the inference, that the right of way in question was intended to pass.]

GURNEY, B.—I do not see any thing in this case to shew, that the parties intended to use these words in a different sense from the ordinary legal one.

Rule discharged.

DOE *d.* WILLIAM PHILLIPS, JOHN JONES, and LEWIS
MORRIS *v.* EVANS and LLOYD.

The insolvent proceedings may be proved according to the mode prescribed by the late act 7 *Geo. 4*, c. 57, although the proceedings were commenced and took place under the former act 1 *Geo. 4*, c. 119.

EJECTMENT to recover the possession of certain premises in the county of *Cardigan*. The case was tried before *Alderson, J.*, at the last summer assizes for the county of *Cardigan*. It appeared, that, in the year 1794, the premises in question were mortgaged by persons then seised in fee by appointment and demise for a term of

The provisions in the 7th section of the 1 *Geo. 4*, c. 119, with respect to the mode of conducting the sale of the insolvent's estate, are directory only.

Seemle, that by the Statute of Frauds, 29 *Car. 2*, c. 3, an outstanding term, vested in a trustee, upon trust to attend the inheritance, is liable to be seized under an execution against the *cestui que trust*, the owner of the inheritance.

one thousand years. In 1797, *David Jones*, afterwards an insolvent, and father of the lessor of the plaintiff *John Jones*, purchased the premises for 250*l.*, and they were, by lease and release of the 1st and 2nd *June*, 1797, conveyed to him in fee, the term of one thousand years being assigned to one *John Moses*, to attend the inheritance. The said *David Jones*, on his marriage in 1807, settled the premises on himself and wife for their lives, and after their decease on their first and other sons, &c. *John Jones*, one of the lessors of the plaintiff, is their eldest son. *David Jones* was taken in execution in *August*, 1820; and, on the 29th *December* following, he petitioned to be discharged under the Insolvent Debtors' Act, and executed the usual assignment to Mr. *Henry Dance*, the provisional assignee, and also made out and subscribed his schedule. On the 25th *August*, 1821, he was discharged under the Insolvent Act. On the 6th *November*, 1828, *Dance* executed the usual assignment to *David Evans*, a creditor of the insolvent, as general assignee. *David Evans* sold the life estate of the insolvent on the 13th of *July*, 1830, and the insolvent's son, *John Jones*, one of the lessors of the plaintiff, became the highest bidder and purchaser at 674*l.*; and the life-estate was conveyed to him by indentures of the 11th and 13th *December*, 1830. By indentures of 14th and 15th *December*, 1830, *John Jones*, the lessor of the plaintiff, the insolvent *David Jones*, and his wife, mortgaged the premises to the lessor of the plaintiff, *Lewis Morris*, to secure 1,500*l.* and interest then advanced by *Lewis Morris*. On the 20th of *October*, 1830, letters of administration to the effects of *John Moses*, the assignee in 1797 of the residue of the term of one thousand years, were granted to *Thomas Jones*, otherwise *Moses*, his son, and one of his next of kin. On the 15th of *December*, 1830, the said *Thomas Jones*, otherwise *Moses*, assigned the premises for the residue of the term of one thousand years to the lessor of the plaintiff, *William Phillips*, In trust for the said *Lewis Morris*; and

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after redemption by payment of the mortgage money, to the joint appointment of the said *John Jones* and his mother, and in default thereof to attend the inheritance. The petition for the insolvent's discharge, the assignment of his real and personal estate to *Dance*, the provisional assignee, and the assignment from *Dance* to *David Evans*, the sub-assignee, were proved by certified copies under seal; which was proved to be the seal of the Insolvents' Court. Also the schedule by a similar certified copy, the Justices' adjudication of *David Jones* being entitled to the benefit of the Insolvent Act, and the certificate of the issuing the order for his discharge to the gaoler of *Cardigan gaol*.

E. V. Williams, for the defendant, objected that the insolvent proceedings were not properly proved, and that the legal estate was, therefore, in the trustee of the term of one thousand years for *David Jones*, who was seised of the inheritance; and that the term was liable to be taken under an execution against *David Jones* under the Statute of Frauds. And accordingly he gave in evidence the minutes of the judgment, an *elegit* and inquisition thereon, against *David Jones* in the year 1826; and submitted, that, on the demise of *Phillips*, a moiety only of the land could be recovered, and that the defendant was entitled to a verdict upon all the demises which depended on the insolvent proceedings. He further objected, that the plaintiff, at all events, could not recover on the demise from *John Jones*, the purchaser from the general assignee, because the sale was not proved to have been made conformably to the directions of the 1 *Geo. 4*, c. 119, inasmuch as it is directed by the 7th section, that the general assignee shall sell any real estate of the insolvent within two months after the assignment by public auction, in such manner and at such place as the major part of the creditors of the insolvent, who shall assemble together on any notice in writing, published in the *London Gazette*, &c., shall, under his, her,

or their hand or hands, approve; whereas, in this case it appears, that the sale was delayed for nearly two years; and, besides, there was no evidence that the sale was by auction, or that the other modes described by the act had been followed with respect to the sale: and there was no demise from the general assignee.

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The learned Judge was of opinion that the plaintiff was entitled to recover the whole, but reserved the point as to one moiety, and gave liberty to move to alter the verdict accordingly.

E. V. Williams having obtained a rule accordingly—

J. Wilson and *Chilton* shewed cause.—Whatever may be the question under the Insolvent Act, there is here a demise from *Phillips*, in whom an outstanding term is vested, and in whom the legal estate is; and on that demise the plaintiff must, at all events, recover. That is the term of one thousand years which was assigned by the deed of the 15th December, 1830, by *Thomas Jones* to *William Phillips*. As to the question under the Insolvent Acts, it is said—*First*, That the plaintiff gave no legal evidence of the proceedings, because he gave evidence of the proceedings as under the statute of the 7 Geo. 4, c. 75, instead of under the 1 Geo. 4, c. 119, under which the insolvent petitioned, and was discharged. But the later statute makes the records of the old Court the records of the new; and they may, therefore, be proved as the records are directed to be proved under the new act. By the 76th section of that act, it is provided, that a copy of the petition, schedule, order, and other proceedings purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, &c., shall be admitted in evidence, without any proof, further than that the same was sealed with the seal of the Court. Here, office copies of the documents were produced under the

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seal of the Insolvent Debtors' Court, and therefore they were properly proved according to the provisions of the Insolvent Acts.

Secondly—It is said, that the plaintiff had not proved a sale within six months, nor any notice of the sale as required by the 1 *Geo.* 4, c. 119, s. 7, in order to a meeting of the creditors. But that provision is merely directory, and does not incapacitate the provisional assignee from conveying the estate. And even if it were otherwise, the defendant did not prove that the modes prescribed by the act had not been complied with; and in the absence of evidence to the contrary, it must be presumed that *omnia rite esse acta*. The onus lies on the defendant, to shew that the provisions of the act were not complied with. It would be attended with great inconvenience, if the onus were thrown on the purchaser. It would give always a doubtful title, depending upon whether the preliminary requisites had been complied with or not. *Doe v. Spencer* (a) and *Dance v. Wyatt* (b) shew that the act is merely directory. But those objections apply only to the demise from *John Jones*—they do not apply to the demise from *William Phillips*. The only objection as to that is, that under the *elegit*, in 1818, this term was seized in execution. [*Bayley, B.*—May you not take a term for years in execution?] It is apprehended not. It has been decided, that an equitable interest in a term of years cannot be taken in execution under a *fi. fa.* *Scott v. Scholey* (c), referred to in 2 *Saund.* 11 a, n. (m); and it is there said, “in which case Lord *Ellenborough* seems to have been of opinion, that a trust estate for years is not within the statute 29 *Car.* 2.” In giving judgment in *Scott v. Scholey*, Lord *Ellenborough* says, “The very silence of the statute, which, while it expressly introduces a new provision in respect of *lands and tenements* held in trust for the person against whom an execution is

(a) 11 B. Moore, 7, 232; S. C. 486.

3 Bing. 203, 370.

(c) 8 East, 466.

(b) 4 M. & P. 201; S. C. 6 Bing.

sued, says nothing as to trusts of chattel interests, affords a strong argument that those interests were meant to continue in the same situation and plight, in respect of executions, in which both freehold and leasehold trust interests equally stood before the passing of that statute." [Bayley, B.—There the defendant had had a lease of the premises, but had assigned it, and had nothing remaining in him but a bare equitable interest. You are to contend, that they cannot seize the freehold, because the term protects it; and not the term, because it is only an equitable interest. Here *David Jones* was seised in fee of these premises, subject to the term. Can you protect the fee against the *elegit*? The case of *Scott v. Scholey* was a very different case from the present. There a person had only an equitable interest in a term for years; he had not the inheritance.] It was determined, in *Doe v. Greenhill* (a), that even if a clear trust term of years be within the statute, yet it must be held simply and solely in trust for the defendant; and, as in that case it was held for the defendant and another, the statute was considered not to apply; and, doubtless, the same rule would prevail as to trusts of freehold. [Bayley, B.—Here this party was possessed of this term in trust for *David Jones*, and *David Jones* only.] If he was a trustee for any one, he was a trustee for *Henry Dance*, the provisional assignee. An execution must be sued against the property that a party has at the time of the execution being sued out, not against what he has alienated. Then, if this estate passed to *Dance* in 1818, the term would be held in trust for him, and it could not be taken under the *elegit* in 1826 against *David Jones*.

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E. V. Williams, contra.—In this case there are several demises relying on title under the insolvent proceedings, and one under the trust estate assigned to *W. Phillips*

(a) 4 B. & A. 684. See also *v. Pugh*, 12 B. Moore, 577; *S. C. Harris v. Booker*, 12 B. Moore, 4 Bing. 335. 283; *S. C.* 4 Bing. 96; and *Harris*

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for the residue of the term. *First*—The plaintiff is not entitled under the insolvent proceedings. Either the legal estate is still in the insolvent, or in the general assignee, *David Evans*. No title has been shewn under the insolvent proceedings, because the case has been proved under the present Insolvent Act instead of the former act, under which the insolvent was discharged. By the act of 1 *Geo.* 4, c. 119, s. 45, a true copy of the petition, schedule, order, judgment, and other proceedings, signed by the officer, is made legal evidence of the same. By the present act the assignment is sufficient proof of the title of the assignee, without proof of any other proceedings. *De-lafield v. Freeman* (a). There is no power given by the first act to make the assignment alone evidence; but the plaintiff ought to have proved the previous proceedings by shewing the signature of the officer certifying them to be true copies. [*Bayley, B.*—The consequence of that would be, that, unless the 7 *Geo.* 4 applies to proceedings under the 1 *Geo.* 4, there would be no means of proving them at all, as the present officer has no right to sign; he seals; sealing is substituted for signing: by a liberal construction, the word signature may be satisfied by sealing.] The late act does not so view it, as the act says it shall be sufficient if it purports to be signed. The act proceeds on this principle; it requires less positive proof of signature, and superadds the necessity of proving the seal of the Court. It is clear, that, under the present act, the words “purporting to be signed,” and “sealed with the seal of the Court,” must mean both; and that sealing alone is not sufficient. But the present act does not apply to proceedings under the 1 *Geo.* 4. It says, s. 1—“And that all things shall and may be done by all persons relating to the matters of such petitions, which such persons might have done, if the said recited acts had been continued by this act; and that the said recited acts (except as is here-

(a) 3 M. & P. 704; S. C. 6 Bing. 294.

inbefore provided) shall be repealed, and the same are hereby repealed, except as aforesaid. [*Bayley, B.*—Then you ought to go a step further; because, if the latter statute repeals the former acts, then you must prove it as at common law.] This act expressly forbears repealing the former act with respect to proceedings commenced under it. It provides for a transfer of the records, and only partially repeals the former acts. The old act *quoad* these proceedings was unrepealed. Then, another question here is, whether the sale was not void by reason of non-compliance with the seventh section of the 1 *Geo. 4*, which requires that the real estate shall be sold by auction within two months, and that notice of the sale with a view to a meeting of the creditors shall be given; and the question is, whether the act is directory or imperative in that respect. [*Bayley, B.*—You are aware of the note in *Chitty's Statutes*, 296, that the omission to convene a meeting of the creditors was held by the Court of *King's Bench* to be no bar to the action of the assignee. If the legal estate is once vested in *Dance*, what becomes of your *elegit*? It is quite immaterial whether the sale was valid or invalid.] They may have a verdict on that, but not on the demise by *John Jones*. Here, an important right is given to creditors, in the nature of a power to the general assignee; and that power must be executed with the required solemnities. *Elliot v. Danby* (a), *Berry v. Bowes* (b). Those were cases under the bankrupt act, where the commissioners had by indenture assigned the lands to the lessor of the plaintiff, which indenture was afterwards inrolled; the declaration was on a demise made after the indenture, and before inrolment; and it was holden ill, as without inrolment it was no sale. There, the inrolment did not go to the essence of the thing. [*Bayley, B.*—That was a statutable conveyance not allowed by the common law. The whole estate

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(a) 12 Mod. 3.

(b) 1 Ventr. 360; Sir T. Jones, 196.

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is here vested in the assignee; he is not a mere conduit pipe. If the assignee makes an unprofitable bargain, the creditors may interfere. Here there is nothing to shew that they had done so; therefore, in the absence of any such complaint, it is to be presumed *omnia rite esse acta*. You do not shew that the requisites of the act have not been complied with. The onus of proof is on you. This is not the mere exercise of a power. The exercise of a power is where I have a right to appoint over your property. If I have the legal estate, I do not exercise a power. It is for you to make out that the requisites of the act have not been complied with. If you could have proved, for instance, that it was not a sale by public auction, that would have shewn that they had not complied with the provisions of the act.] As to the demise on the trust estate, we are at all events entitled to a moiety. The insolvent is the *cestui que trust* of the term of one thousand years. In *Scott v. Scholey*, Lord *Ellenborough* puts that case on the ground of its being a mere equitable interest, a resulting trust. [*Bayley, B.*—That was certainly quite a different case. There the party had not the inheritance in him; but had only an equitable interest.] There it was only a resulting trust in equity after payment of a debt. [*Bayley, B.*—And therefore, if it had been held that the term might be seized, it would have superseded the charge on the estate.] In *Doe v. Greenhill* (a) it is put, that a clear and simple trust for the benefit of the debtor is seizable.

Cur. adv. vult.

BAYLEY, B.—This was an ejectment on the several demises, first of *William Phillips*, then of *John Jones*, and lastly of *Lewis Morris*. *Phillips* claimed in the character of trustee, as assignee of an outstanding term. *Jones* claimed as purchaser of the estate under the general as-

(a) 4 B. & A. 699.

signee of the insolvent. Looking to the evidence, the title of *Phillips* to a moiety is quite clear. The term under which *Phillips* claimed was created by deed of appointment and demise in 1794, was conveyed to *John Moses* in 1797, and from him the term was assigned by *Thomas Jones*, his administrator, to *William Phillips*, one of the lessors of the plaintiff; so that the title was clearly traced from the creation of the term to *Phillips*, the lessor of the plaintiff. Then an *elegit* was issued in 1826, under which this term was seized; so that the plaintiff would be entitled to a verdict for a moiety of the land on that demise, the legal estate being in the trustee. The other question is, whether there was sufficient evidence of the proceedings under the Insolvent Debtors' Act, so as to warrant the conveyance by the assignee to *David Jones*. On the trial, a copy of the petition and different documents and proceedings under the Insolvent Act were produced, authenticated under the seal of the Insolvent Debtors' Court. But it has been insisted on by Mr. *Williams*, that there was no legal proof of the insolvent proceedings; that, therefore, it cannot be assumed that the party was insolvent, but that he was, as far as it legally appears, the owner of the inheritance at the time of the *elegit* executed; and, consequently, that a moiety was seizable under the stat. 29 Car. 2, in the hands of the trustee. And I agree with him that it is so, if the insolvent proceedings were not properly proved. Mr. *Williams* says, they were not, because the office copies should have been proved to have been *signed* by the proper officer, as required by s. 45 of the 1 Geo. 4, and not merely *purport* to be signed and sealed with the seal of the Court, as directed by the 7 Geo. 4, c. 75. But I think, that, looking at both acts together, they are one system; and that it must be intended, that what is evidence of the proceedings under the 7 Geo. 4, should be evidence of the proceedings under the corresponding clause in the 1 Geo. 4. That statute directs, that every assignment shall be entered on the

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proceedings of the Court; and it provides, that an office copy shall be sufficient evidence thereof in all Courts; and the 45th section provides, that a true copy of the petition, schedule, order, judgment, and other proceedings, signed by the officer in whose custody the same shall be, certifying it to be a true copy, shall be admitted in all Courts as legal evidence of the same. Then came the 7 *Geo. 4*, c. 57, by which, sect. 1, the powers given to the Court established by the 1 *Geo. 4* are vested in the Court continued by the 7 *Geo. 4*, so far as they relate to the petitions of persons who had petitioned under that act, or to persons discharged under the 53 *Geo. 3*, and which is in other respects repealed. The 7 *Geo. 4* did not create, but continued the provisions of the former act. By the 19th section, the conveyance to the assignee is to be filed of record; and a copy of the record, on parchment, purporting to have the certificate of the provisional assignee indorsed thereon, and *to be sealed with the seal of the Court*, shall be sufficient evidence of the assignment, and of the title of the provisional assignee, in all Courts, &c. That creates a distinction between the two acts. But, by the 89th section, all the records then in the Court are to remain in the custody of the officers of the Court, and shall be deemed the records of the Court so continued as aforesaid. It would, therefore, be strange, if there should be one rule of evidence as to one set of records, and another as to the other. The 76th section is the clause applicable to the evidence of these proceedings. By that section it is enacted—"that a copy of the petition, schedule, order, and other proceedings, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, &c., shall be admitted in evidence, in all Courts, as sufficient evidence of the same, without any proof further than that the same is sealed with the seal of the Court." Now, the proceedings produced in this case were proved conformably to the 76th section of the 7 *Geo. 4*; and there was no proof,

dehors the instrument itself, that it was the seal of the Insolvent Debtors' Court: but it purported to be signed by the officer of the Court. The 76th section, as it seems to me, substitutes sealing for signing, in all cases where the proceedings are to be given in evidence. The seal of the Court then becomes the signature of the Court and of the officer. Under the Statute of Frauds, 29 Car. 2, c. 3, it has been held, that the sealing of a document is, substantially, signing; and if so under that act, why not under the present. I am of opinion, therefore, that these were office copies, properly receivable in evidence. If so, that prevents the *elegit* taking effect; and the whole of the premises would be recoverable under that demise.

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As to the question whether the title proved supports the demise from *Jones*, the purchaser, the objection was, that the plaintiff had not shewn a compliance with the act as to a meeting of the creditors, &c. thirty days before the sale, according to the provision in the 7th section of the 1st Geo. 4, c. 119. If that is to be considered as conditional, then the plaintiff must have proved that meetings were held; but in our judgment the statute is directory only. It would be very inconvenient if it should become necessary, in order to make out a title when the estate got into other hands, that all these matters should be required to be proved to have been complied with. But if the statute be not directory in that respect, I think there is another answer. Four years have elapsed since the sale, and no objection has been taken to the validity of it by any of the creditors. Therefore, in the absence of any such objection, it must be presumed that *omnia ritè esse acta*. Therefore, on that demise also I think that the plaintiff is entitled to a verdict, and that this rule must be discharged.

VAUGHAN, B.—I entirely concur in the judgment delivered by my brother *Bayley*. My only reason for deferring my judgment was, that I thought it desirable to look over the sections of the acts with some care. It

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was objected by Mr. *Williams*, that the evidence of the insolvent proceedings was not sufficient. My attention was called to the 1st section of the 7th *Geo. 4*, by which I collected from Mr. *Williams* that the original proceedings under that act were to be considered still in force, so far as related to the matters of the petition and all proceedings. It is clear that this act applies to all future petitions; but, when you look to the clauses of the 7 *Geo. 4*, it is plain it was never intended to continue the clause in the 1 *Geo. 4*, relating to evidence after that act passed. Every part is repealed, and is not re-enacted by that act, and when you come to look at the terms of the acts, and the reasons, it seems obvious that the clause in the former act, with regard to the evidence of the proceedings, was not meant to be continued. It was probably found inconvenient to take down the officer to prove his signature, and it was deemed desirable to substitute sealing for signature; but, without deciding whether sealing be signing, I am distinctly of opinion that the clause of the late act was intended to be substituted for the provision in the former act. I am of opinion also that the 7th section of the 1st *Geo. 4*, relating to the sale of the insolvent's estate, is directory and not imperative, and that the onus is on the other side to prove that the provisions of the act had not been complied with.

GURNEY, B.—I am of the same opinion on both points. Two cases have been cited, applicable to the second point. In one case it was held, that where the act of 7 *Geo. 4*, c. 57 declares, that it shall be lawful for the provisional assignee to sue in his own name, if the Court shall so order, that that was only affirmative of the provisional assignee's right, and that he might sue in his own name; and that it was not necessary to shew that he was suing with the permission of the Court. A little attention to the clauses of the acts shews, that this is not only the proper evidence, but the only evidence of the proceedings. The

1 Geo. 4, which created the Court, directs an assignment to be entered on the proceedings of the Court, and that an office copy shall be evidence. The 45th section of the 1 Geo. 4, directs, that a true copy of the petition, &c. signed by the officer in whose custody the same shall be, &c., shall be admitted in evidence in all Courts. Looking at the 7 Geo. 4, we see that its object is to continue the Court with enlarged powers. In the first place it continues the powers as to all existing cases. By section 3, it is provided, that the Court shall have a seal, and shall cause to be sealed all such records, &c. as are hereby required to be sealed, and such other records as the Court shall require. Then it goes on to enact, by s. 89, that all records now in the Court shall be deemed the records of the Court so continued. Therefore, the records of the Court before constituted become the records of the new Court. Now, what is to be done with regard to the records of the new Court is declared by the 76th section, which, it appears to me, concludes the question. That section provides that a copy of the petition, schedule, order, and other proceedings, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy, shall be admitted in evidence in all Courts as sufficient evidence of the same, without any proof further than that the same is sealed with the seal of the Court. That proof was here given; and, therefore, I am clearly of opinion, that the proceedings were properly proved.

Rule discharged.

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d.
PHILLIPS
v.
EVANS.

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1833.

WILLIAMS v. DAVIES.

Where there are cross demands, and the defendant pleads a set-off, the plaintiff is not obliged to prove the whole of his account in the first instance, but may prove only the balance which he claims; and after the defendant has proved his set-off, the plaintiff may prove other parts of his account to shew that a larger sum was due.

ASSUMPSIT on several bills of exchange with the common counts. The defendant pleaded *non assumpsit*, the statute of limitations, and a set-off.

At the trial before Lord *Lyndhurst*, C. B., at the *Middlesex* sittings after last *Michaelmas* Term, the plaintiff, in the first instance, proved a sum of 22*l.* 6*s.* 8*d.* to be due to him from the defendant, and said that he had documents to prove a larger sum to be due, which he should not put in, unless the defendant proved his set-off. *Chilton*, for the defendant, insisted that the plaintiff was bound to prove his whole demand in the first instance, and had no right to go into evidence in reply, having in part met the defendant's case. The defendant then proved his set-off to a larger amount than the plaintiff had proved. In answer to the defendant's case, the plaintiff proposed to prove two bills of exchange which he had accepted for the defendant's accommodation, and had paid; and the learned Judge having allowed him to do so, a verdict was found for the plaintiff.

Chilton now moved for a new trial on the ground, amongst others, that the evidence in reply had been improperly received; and that it was too late after the plaintiff had closed his case, to give evidence of demands which he had not made part of his case in the first instance. He relied upon *Rees v. Smith* (a), where Lord *Ellenborough* states the general rule to be, that when by pleading or by means of notice the defence is known, the counsel for the plaintiff is bound to open the whole case in chief, and cannot proceed in parts; that when it is known what the question in issue is, it must be met at once. He also cited *Browne v. Murray* (b), where Lord *Tenterden* held

(a) 2 Stark. N. P. C. 31.

(b) Ryan & M. N. P. C. 254.

that in an action for a libel, where the general issue was pleaded and also special justifications, the plaintiff might in the outset give all the evidence he intends to give to rebut such justification, or he might do so in reply to evidence produced by the defendant; but that he was not entitled to give part of such evidence in the first instance, and to reserve the remainder for reply to the defendant's case.

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LORD LYNTHURST, C. B.—The consequence would be that the plaintiff might have to go into proof of many years' transactions, when it would be quite unnecessary to the claim which he made. Either of the two ways of proceeding may be correct; and it must be left to the discretion of the Judge to admit the evidence or not; and if ultimately the evidence is received, it cannot be complained of.

BAYLEY, B.—Where evidence is rejected improperly, it is a ground for a new trial. But have you ever known a case, where a new trial has been granted, because a Judge, in the exercise of his discretion, has allowed a party to give evidence at a late period of the cause? It is not part of the plaintiff's case in the first instance—he claims and proves the lesser sum. Then the defendant says, that he has a set-off. The plaintiff puts him upon proof of it, and when he has proved his set-off to a certain amount, the plaintiff says, that is not to be set off against what I claim, for there is another sum due to me which I now prove.

Rule refused.

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SABINE *v.* FIELD.

The Court refused to allow a plaintiff to sign judgment on the return of *nihil* to two writs of *sci. fa.*, it not appearing that any endeavour had been made to give the party notice.

THE plaintiff having returned *nihil* on two writs of *sci. fa.*, *Platt* now moved for judgment.

Sed per Curiam.—It does not appear that any endeavours have been made to give the party notice.

Rule refused.

(a) See Reg. Gen. Hil. Term, 2 Will. 4, rule 81; and see *Lockwood v. Orme*, and *Newton v. Flight*, cited in Jervis's Rules, pp. 87, 88.

MEMORANDA.

IN the course of this Term *Thomas Noon Talfourd*, Esquire, was called to the degree of Serjeant at Law, and gave rings with the motto—*Magna vis veritatis*.

In the vacation after this Term, *David Pollock*, Esq., *Philip Courtenay*, Esq., *John Blackburne*, Esq., and *W. H. Maule*, Esq., were appointed his Majesty's counsel learned in the law.

REGULA GENERALIS.

COURT OF EXCHEQUER CHAMBER, MICH. TERM, 2 WILL. 4.

IT is ordered, that, henceforth, the costs of proceedings upon writs of error from the Court of *Exchequer* to this Court be taxed and allowed by the Master of the Court of *Exchequer*.

TENTERDEN,
N. C. TINDAL,
S. GASELEE,
J. PARKE,

J. B. BOSANQUET,
W. E. TAUNTON,
E. H. ALDERSON,
J. PATTESON.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

EXCHEQUER OF PLEAS, EASTER TERM, 3 WILL. IV.

HUNTLEY v. SANDERSON and WILKINSON.

1833.

THIS was an action of *assumpsit*—the declaration was filed 29th *January*, 1833.

The *first* count stated, That on the 17th *June*, 1826, in consideration that the plaintiff, at the request of the defendants, would purchase a cargo of timber for the defendants, at a certain place beyond the seas, to wit, *Miramichi*, in *New Brunswick*, and would draw a bill of exchange for

S. & Co., the owners of a ship of which *H.* was captain, despatched the latter to *Miramichi*, with instructions to purchase a cargo of timber, and draw upon them for the amount. *H.* proceeded to *Miramichi* ac-

cordingly, and there purchased some timber from one *L.*, for 154*l.* 11*s.* 11*d.*, and drew a bill upon *S. & Co.* for the amount, at sixty days' sight, in favour of the seller or his order. The bill was dated 4th *September*, 1826; and, on the 21st *November*, it was duly presented for acceptance and protested for non-acceptance. The plaintiff was in *Liverpool*, with the ship under his command, from *October*, 1826, until *April*, 1827. It was not proved that the plaintiff received any notice of the dishonour of the bill, either from the then holder or from the defendants, who had got the cargo. In 1832, the plaintiff was arrested upon this bill, at *Miramichi*, and paid it, in order to release himself from the arrest. In a special action of *assumpsit*, brought by the plaintiff against the defendants for not paying the bill, for not accepting it, and for not indemnifying the plaintiff from all loss &c. sustained by him from having drawn the bill:—*Held, first*, that, under these circumstances the defendants could not insist on the want of proof of notice to the plaintiff of the dishonour of the bill, as a defence to the action; *secondly*, That a promise to indemnify was the promise which the law would, in this case, imply; and as there was no damnification till 1832, the statute of limitations did not apply.

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the amount of such cargo upon the defendants, they the defendants undertook and promised the plaintiff that they would duly pay such bill when due. That the plaintiff, confiding &c., on the 4th *September*, 1826, at *Miramichi* aforesaid, to wit, at &c., purchased a cargo of timber for the defendants, whereof he purchased part of one *William Ledden* for 154*l.* 11*s.* 11*d.*, and then and there drew a certain bill of exchange upon the defendants for the amount of the purchase money of the said part of the cargo; by which bill the plaintiff then and there requested the defendants, sixty days after sight of that his second bill of exchange (first and third of the same tenor and date not paid), to pay to the order of the said *William Ledden* the sum of 154*l.* 11*s.* 11*d.* in *London*, for value received, and then and there delivered the same to the said *William Ledden*. That, on the 21st *November*, 1826, at &c., the defendants had sight of the said bill, and were then and there requested to accept the same; and that afterwards, on the 23rd *January*, 1827, at &c., when the said bill became due, and payable according to the tenor and effect thereof, the same was duly presented to the defendants, and the defendants were then and there requested to pay the same. That the defendants, not regarding &c., did not nor would when the said bill was so presented for payment, or at any other time, pay the same; but then and there wholly refused, and have hitherto wholly refused so to do, to wit, at &c., although the said first and third of exchange have not nor have either of them been paid or presented for payment; by means and in consequence whereof the plaintiff, as such drawer of the said bill, afterwards, on the 23rd *October*, 1832, at &c., was called upon and forced and obliged to pay, and did then and there pay to one *Jared Betts*, the holder of the said bill, the said sum of money in the said bill specified, together with certain interest thereon, and the costs of a certain action before then brought, to wit, at &c., by the said *J. B.* against

the said plaintiff as drawer of the said bill, and certain other expenses for exchange, re-exchange, and postage, in the whole amounting to a large sum, to wit, 264*l.* 7*s.* 10*d.* by means of the said several premises the plaintiff hath been and is damnified to the amount thereof, to wit, at &c.

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The *second* count stated—That, on the 17th *June*, 1826, in consideration (as in the first count), the said defendants undertook and promised the plaintiff that they would duly accept such bill when presented to them for that purpose; that the plaintiff, confiding &c., on the 4th *September*, 1826, at *Miramichi* aforesaid, to wit, at &c. (purchase and drawing as in the first count); that afterwards, on 21st *November*, 1826, at &c., the defendants had sight of the said bill, and were then and there requested to accept the same. That the defendants not regarding &c. did not, nor would when the said bill was so presented to them for acceptance, or at any other time, accept the same; but then and there wholly refused so to do, or to pay the same, to wit, at &c., although the said first and third of exchange have not, nor have either of them, been accepted or been presented for acceptance or paid. By means &c. (special damage as in the first count).

The *third* count stated—That, on the 17th *June*, 1826, in consideration (as in the first count), the defendants undertook &c. that they would indemnify and save harmless the plaintiff from all loss, damage, costs, charges, and expenses which should or might be made or brought, arise or happen, for or by reason of the plaintiff so drawing the last-mentioned bill of exchange. That the plaintiff, confiding &c., did afterwards, on the 4th *September*, 1826, at *Miramichi* aforesaid, to wit, at &c. (purchase and drawing as in the first count); that afterwards, on the 21st *November*, 1826, at &c., the defendants had sight of the said bill, and were then and there requested to accept the same; and that afterwards, on the 23rd *January*, 1827, at &c., when the said bill became due and payable according to the tenor

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and effect thereof, the same was duly presented to the defendants, to wit, at &c., and the defendants were then and there requested to pay the same; but that the defendants did not nor would, when the said bill was so presented to them for payment, or at any other time, pay the same, but then and there wholly refused and have hitherto wholly refused so to do, to wit, at &c., although the said first and third of exchange have not nor have either of them been paid or presented for payment. That the defendants not regarding &c. did not nor would indemnify or save harmless the plaintiff from the loss, damage, costs, charges, or expenses arising and happening to him the plaintiff by reason of his the plaintiff's having so drawn the said bills, but have hitherto wholly neglected and refused, and still wholly neglect and refuse so to do, to wit, at &c., by means and in consequence whereof the plaintiff, as such drawer of the said bill, afterwards &c. (special damage as in the first count).

There were three other special counts on promises to indemnify, with the money counts and account stated. Pleas—*Non assumpsit* and the statute of limitations.

At the trial, before *Gurney, B.*, at the Lent Assizes for the county of *Lancaster*, 1833, it appeared, that in 1826 the defendants were owners of the ship *Prince Regent*, of *Liverpool*; that the plaintiff sailed in that vessel as master, in the employ of the defendants, in *June* of that year, from *London*, on a voyage to *Miramichi*, and returned with the vessel to *Liverpool* in *October*, 1826, and that he remained in *Liverpool* until the middle of *April*, 1827; that the defendants gave the plaintiff the following letter of instructions:

“*London*, 17th *June*, 1826.

“Captain *George Huntley*, ship *Prince Regent*.

“Sir—Accompanying this you will receive the papers and all other necessary documents for the present intended voyage to *Miramichi*. On your arrival at that port, you will deliver the letters addressed to Mr. *W. Ledden*,

Messrs. *L.* and *A.*, Messrs. *G.* and *N.*, and Messrs. *M.* and *D.*, and you will inquire and see who has the best timber, and on the most reasonable terms, and at the same time can give the ship the quickest dispatch. You will purchase the timber from those parties who can serve you on the best terms, and give the best dispatch. If Mr. *W. Ledden* can do this, we should wish you to give him the preference, and we request that you will do so, provided he serves you on as eligible terms as the rest will do; (after some further directions) you must keep the ship's disbursements as low as possible, and put the largest possible cargo on board of her. You will draw upon us for the amount of cargo and disbursements in separate bills, and fill up the bills of lading with our address.

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(Signed) "*H. J. Sanderson & Co.*"

It further appeared, that the defendants were not general partners, but made some joint purchases, in which they used the style of *H. J. Sanderson & Co.*; that the plaintiff, in *August*, 1826, purchased a quantity of timber of the above-mentioned *W. Ledden*, the invoice amount of which was 154*l.* 11*s.* 11*d.*, which timber was shipped on board the *Prince Regent*, at *Miramichi*, and was delivered to the defendants at *Liverpool*, in *October*, 1826; that the plaintiff drew the following bill of exchange on the defendants:

"*Miramichi*, 4th *September*, 1826.

"£154. 11*s.* 11*d.* sterling.

"Sixty days after sight of this second of exchange (first and third of same tenor and date not paid), pay to the order of Mr. *W. Ledden* the sum of one hundred and fifty-four pounds eleven shillings and eleven pence, in *London*, value received; which place to account of cargo per *Prince Regent*.

"*George Huntley*.

"To Messrs. *H. J. Sanderson & Co.*

"*Merchants, Liverpool.*"

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That the said bill was duly presented to the defendants at *Liverpool* for acceptance, on the 21st *November*, 1826, when the defendants refused to accept it; and thereupon, a Notary Public at *Liverpool* drew up a regular protest, according to which the bill at the time of presentment for acceptance bore the following indorsements:—" *Wm. Ledden, Jared Bretts, Thomas Patterson, Robert Ligerswood.* Pay to the order of Messrs. *James Hunter & Co. —Rogerson, Hunter & Co.* That the bill was presented for payment on the 23rd *January*, 1827, in the manner mentioned in the protest following, but it did not appear that Messrs. *Barclay, Tritton, Bevan, & Co.* were the bankers of the defendants, or either of them, *viz.* "On this day, the 23rd of *January*, 1827, at the request of Messrs. *James Rogerson* of *London*, merchant, bearer of the original bill of exchange, whereof a true copy is on the other side written, *T. W. D.*, of *London*, Notary Public, &c., exhibited the said bill to a clerk in the banking-house of Messrs. *Barclay, Tritton, Bevan, & Co.*, the bankers in this city of Messrs. *H. J. Sanderson & Co.*, upon whom the same is drawn, and demanded payment of its contents (the time limited in the said bill for payment thereof being elapsed since the same was protested for non-acceptance; and the said bill being payable in *London*, but no particular domicile being fixed or appointed therein or thereby for payment thereof in this city), which demand was not complied with, but the said clerk thereunto answered, no advice; nor could I the said Notary obtain payment of the said bill on the *Royal Exchange* of, or elsewhere in, this city; whereupon," &c. And that the defendant *Wilkinson* became a lunatic in *April*, 1830, and has ever since continued so. It further appeared that in *October*, 1832, the plaintiff arrived in *Miramichi*, and was arrested on the bill, by *Jared Betts*, and that he paid the amount of the bill, together with expenses. The arrival of a vessel at *Liverpool* is well known there, being advertised in all

the newspapers, and the plaintiff's arrival there must have been known.

It was objected for the defendants, that the plaintiff ought to have proved that he had received due notice of the dishonour; and that the statute of limitations was a bar. *Gurney*, B., reserved the points, and a verdict was taken for 204*l.*, subject to them.

A rule *nisi* having been obtained, cause was shewn in *Easter Term* by—

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Wightman, for the plaintiff.—The main question is, whether the statute of limitations is a bar. As to the question of there being no notice, there was no evidence one way or other to shew that the plaintiff was discharged by the laches of any prior parties;—as between these parties the question does not arise. There was nothing to make it necessary to prove such notice of dishonour, the defendants being strangers to the bill. The bill is drawn by the plaintiff as the agent and at the request of the defendants, and was to be provided for by them. He had a right to expect that they would accept and pay the bill, and it was not his duty to make inquiries. But the main question is on the statute of limitations. The contract was one of indemnity. At the end of six years he is arrested on this bill at *Miramichi*. The statute, therefore, cannot apply, because he would bring no action until he was damaged. The only action the plaintiff could bring being then on the implied contract to indemnify against damage, how could the plaintiff bring his action before he suffered damage? The statute cannot begin to run until the contract to indemnify is broken. This distinguishes the case from the cases relied upon on the other side as to the implied undertakings of attornies and others. In that class of cases the thing was to be done at a particular time, and the liability arose from the time of that promise being broken, and there was then a right of action, though not

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to the extent of the damage which subsequently accrued. Here it was not the plaintiff's duty to make inquiries, he had a right to presume that they would accept and pay the bill. Whether they did so or not was immaterial to him so long as he was not damnified. It was on that damnification and their neglect to indemnify him that his cause of action arose.

Cresswell, for the defendant *Sanderson*.—Both the points made on behalf of the defendants are answers to the plaintiff's case. On such a bill as this notice must be sent by the first regular ship. *Muilman v. D'Eguino* (a). If that was an available defence for the plaintiff, he cannot, by paying it, put the present defendants into a worse situation. *Turner v. Leach* (b) is a strong authority on this point. There, the indorsees of a bill of exchange paid a subsequent indorser, who had been found guilty of laches, and gave notice of dishonour to the defendant, a prior indorser; and though from the numbers of indorsers on the bill, the defendant, in point of fact, received notice of dishonour at an earlier period than he would have done if the bill had passed regularly through all the indorsers, still it was held, that the plaintiff could not waive the laches of the prior parties; and that, having been discharged by that laches from his liability to pay the bill, he had paid it in his own wrong, and could not recover over against the defendant. In the present case how could the plaintiff sue if he was a volunteer in making this payment when he had a legal defence? [*Bayley, B.*—How do we know that he had a legal defence?] The burthen of proof is surely on the plaintiff. A party suing on an indemnity must shew that the party who has sued him was in a situation to enforce his claim. Suppose that the defendants could have proved negatively that no notice was given, it is clear that

(a) 2 H. Bl. 565.

(b) 4 B. & A. 451.

the injury which he had sustained was through his own fault, and that he could maintain no action. Here, therefore, the burthen of proof being upon the plaintiff, he was bound to make out his allegations; but he has not made out that he was compellable by law to pay the bill, and, therefore, if he has been damnified, it has been by his own fault. As to the second point, the ground of the plaintiff's complaint is, that the defendants did not make themselves parties to the bill. There was an implied promise to accept, and the defendants broke that contract. *Marzetti v. Williams* (a) shews, that the cause of action was then complete, although no damage had then occurred to the plaintiff. The promise may have been to indemnify, but it was to indemnify by accepting, and afterwards providing for the bill. The case is, therefore, exactly the same in principle as *Battley v. Faulkner* (b), in which the cause of action was held complete on the delivery of wheat of a different kind from that agreed to be delivered; and, although the special damage occurred within the six years, the statute was held to be a bar. *Short v. Macarthy* (c), and the other cases arising on the negligence of attornies and others (d), some of which seem extremely hard cases, establish the above principle. A jury might, perhaps, have given him the whole amount to put him into funds to meet the bill. [*Bayley*, B.—No jury could, by law, have given him such damages.] The amount of damages not being ascertained is certainly no criterion. In the cases cited, there was no actual damage until after the breach of contract. The older cases establish the same point. In *Barkly v. Kempstow* (e), (cited and confirmed in 3 *Wilson*, 138), which was an action to save harmless and indemnify from escapes, it was held, that immediately upon the escape the plaintiffs were damnified

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(a) 1 B. & Ad. 415.

(b) 3 B. & A. 288.

(c) 3 B. & A. 626.

(d) See 2 Bro. & B. 72, 372.

and *Howell v. Young*, 5 B. & C. 259; and the other cases there cited.

(e) Cro. Eliz. 123.

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and in danger to be sued, and might sue the defendant presently, and not tarry till they were sued. There is no real distinction between that case and the present;—there the promise was to keep safely and keep harmless—here it was to accept the bill and save harmless. The action accrued where the promise to keep safe in the one case, and to accept in the other, was broken. To make any thing of the argument on the other side, it ought to be shewn that no cause of action accrued on the part of the person to accept, but the authorities shew clearly that it did.

Cowling, for the defendant *Wilkinson*.—The plaintiff must shew that he was under a legal obligation to pay the money (*a*). He avers that he was compelled to pay; without proving that notice was sent him by the first regular ship to *Miramichi* (*b*); he does not prove that averment. If he was discharged by the want of notice, he could not make the defendants liable by subsequently paying the bill. *Turner v. Leach* (*c*), *Roscow v. Hardy* (*d*), *Marsh v. Maxwell* (*e*). [*Bayley*, B.—There the plaintiff was endeavouring to recover against a prior party to the bill; here, he sues on the contract of indemnity.] There is no greater hardship or difficulty in requiring the plaintiff to prove notice here, than when suing a prior party; if the plaintiff had paid in pursuance of a judgment obtained against him, that might have supplied the deficiency. As to the statute, the only implied promise was, to accept or to indemnify by accepting; but, even supposing a general contract of indemnity to be implied, it was broken by the refusal to accept, and the plaintiff might then have brought an action, he being then liable to be sued, and such liability being a sufficient damnification. A contract of indemnity is an active contract, and means that the party shall do some act, as by

(*a*) *Shepherd's Touchstone*, 390.

(*b*) 2 H. Bl. 565.

(*c*) 4 B. & A. 451.

(*d*) 12 East, 434.

(*e*) 2 Camp. 210, n.

providing funds, &c., in order to prevent the other from being damnified; it would, therefore, be broken on non-acceptance, since the defendants had then failed to do anything for the plaintiff's security. A different construction, namely, that the plaintiff must suffer some real loss before he can sue, would make an imperfect indemnity, since it would assume that the plaintiff must have actually been damnified; and would be prejudicial, for perhaps the guarantier might, in the mean time, become insolvent, and the other would then lose all redress against which he might have guarded himself if he could have sued previously. Thus the plea of *non fuit damnificatus*, though in form a negative plea, is, in reality, an active one. *Broughton's case* (a). So, a person agreeing to save harmless from an obligation, ought to discharge it by release or otherwise, and commits a breach, if the obligation be forfeited whereby a liability to be sued is incurred (b). *Barkly v. Kempstow* (c); *Abbots v. Johnson* (d); *Bullock v. Lloyd* (e). This is also admitted by the Court in *Goddard v. Vanderheyden* (f), though they decided there that until payment the cause of action did not assume the form of a debt. If the plaintiff had concluded the counts of the declaration by merely averring a refusal to accept, they would have been good, and a plea that the defendants afterwards took up the bill would not have been a bar. [*Bayley, B.*—Could the plaintiff maintain an action until he had suffered some actual damage?] *Marxetti v. Williams* (g) is an authority that he might; so is *Vant Wart v. Woolley* (h), which also tends to shew that the plaintiff ought to receive nominal damages only, for since he purchased abroad he would pledge his own credit, and might, therefore, have maintained an action against the defendants for goods sold and delivered. And

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(a) 5 Co. 24 a.

(b) Com. Dig. Condition, J.

(c) Cro. Eliz. 123.

(d) 3 Buls. 233.

(e) 2 Carr. & P. N.P.C. 119.

(f) 3 Wils. 262, 270, 272.

(g) 1 B & Ad. 415.

(h) 3 B. & C. 439; S. C. 5 D. &
R. 347; 1 M. & M. N.P.C. 510.

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his having lost that remedy by lapse of time is his own fault, and ought not to prejudice the defendants. The cases cited, particularly *Bullock v. Lloyd*, shew that the plaintiff might have recovered the whole sum from the defendants immediately on non-acceptance; but, even if he could have recovered nominal damages only, the judgments in *Howell v. Young* (a) shew the statute would have been a bar. That case shews, as soon as a cause of action is complete, the statute commences running. And it is immaterial that the special damage is recent, or that the plaintiff had no notice of the breach. Every count, particularly the *third*, states the payment by the plaintiff as the consequence of a prior cause of action, and not as a cause of action itself.

Cur. adv. vult.

The judgment of the Court was now delivered by—

BAYLEY, B.—This was a special action of *assumpsit* upon a promise to pay a bill of exchange, drawn by the plaintiff upon the defendant, upon another promise to accept it, and upon a third promise to indemnify the plaintiff from all loss, damages, costs, charges, and expenses which might happen to him from his having drawn the bill. The facts of the case were shortly these. The defendants were owners of the ship, *Prince Regent*, of which the plaintiff was the captain, and in *June* they dispatched him to *Miramichi*, with instructions to purchase a cargo of timber, and draw upon them for the amount. The plaintiff proceeded to *Miramichi* accordingly, and purchased timber there, from *W. Ledden*, to the amount of 154*l.* 11*s.* 11*d.*, and drew a bill on the defendants for that amount at sixty days' sight, in favour of the seller, *William Ledden*, or his order. The bill was dated 4th *September*, 1826, and on the 21st *November* it was duly presented for acceptance,

(a) 5 B & C. 259.

and protested for non-acceptance. It was again presented for payment at the time when, if it had been accepted, it would have become due; but a doubt having been raised whether that presentment was at a proper place, and it being immaterial whether a due presentment was made or not, that presentment may be laid out of the case. The plaintiff was in *Liverpool*, with the *Prince Regent* under his command, from *October, 1826*, until the middle of *April, 1827*; and it did not appear, upon the trial of this cause, that he received any notice of the dishonour of the bill, either from the then holder, or from the defendants who had got the cargo (the consideration for the bill) and had dishonoured the bill by which payment for that cargo was to have been made. In 1832, the plaintiff was at *Miramichi*, and was arrested there upon this bill, and he paid it to release himself from the arrest; and whether he is entitled to be reimbursed by the defendants is the question in this cause. Two objections are relied upon by the defendants, one, that, as the plaintiff did not appear to have had notice of the bill's dishonour, he was under no legal obligation to pay it, and paid it of his own wrong; the other, that his right of action accrued upon the dishonour of the bill by the refusal to accept; that the subsequent damnification, by his being forced to pay, gave no new right of action, though it might influence the damages, and, consequently, that the statute of limitations was a bar. As to the former, this is not the case of an ordinary drawer of a bill of exchange, but that of a drawer identified in a great degree with the defendants, his drawees, and left unwarrantably in ignorance by them, when they ought to have apprized him of their refusal to accept, and deserted by them when they ought to have given him protection. The bill was drawn for goods bought by the plaintiff; he was agent in that purchase for the defendants, they are his principals; he draws upon them for payment, they dishonour his draft;—they do not appear to have given any reason

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for that step. Was not this, then, in substance, a disavowal of his agency and right to draw? and might it not reasonably be expected that the tribunals at *Miramichi* might have held this a case in which the plaintiff would have been liable upon the bill, even without notice of the refusal to accept? He either had authority from the defendants to draw, and was really their agent, or he was not. If he were, he would have his remedy over against them, and so would be indemnified; if he were not, he was to be considered as principal, and in the former case he might have been considered by the Court at *Miramichi* as standing upon the same ground with the defendants, and equally liable with them. Suppose, however, that the plaintiff had a fair chance of resisting the claim upon him at *Miramichi*, have the defendants so conducted themselves towards the plaintiff as to justify them in making the objection that he did not. They ought to have apprized him of their refusal to accept, and of the motives on which that refusal was grounded, but they did not; they ought to have given him instructions what course to pursue if he were called upon for payment, and should have given him authority and directions upon whom to call in case of need, but they do neither. The defendant was arrested in a foreign country, as far as we can judge, unexpectedly, for a debt which was not his own, but for which the defendants, his employers, had had value; he is without any instructions how to act; it does not appear from whom he got assistance; and, under these circumstances we are of opinion that the defendants cannot say he did wrong in paying the money. Upon the special grounds, therefore, that the plaintiff drew the bill because he was agent to the defendants; that it was drawn not for his own purposes but to pay for goods he had bought for them; that it does not appear they ever apprized him they had dishonoured the bill, or gave him any instructions how to act if called upon for payment—we are of opinion, that the want of notice to the plaintiff, of the dishonour of the

bill, from the then holder of the bill, furnishes no ground of defence in this action. *Exch. of Pleas, 1833.*

The second ground of defence is upon the statute of limitations, and that is founded upon the ground that the promise to accept, or the promise to pay, is the promise the law would imply in this case, not the promise to indemnify; but, upon consideration, we are of opinion that the promise to indemnify is the promise the law would imply. There might be justifiable grounds for a refusal to accept or pay, (fraud, for instance, or want of title in the seller), and it would be against reason to imply that the defendants should forego their right to insist upon any such ground; and it would be utterly immaterial to the plaintiff whether they accepted or paid, so long as the neglect to accept or pay did not damnify him. Besides, upon a promise to accept or pay, there could be no proper rule for estimating the damages till damnification. We are, therefore, of opinion, that the promise to indemnify is the promise the law would, in this case, imply; and as there was no damnification till 1832, the statute of limitations does not apply.

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Rule discharged.

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MANSEL had obtained a rule in this case to set aside the writ, &c. for irregularity.

Thesiger shewed cause, and objected to the affidavit on which the rule had been obtained for not giving any addition to the deponent, who was the defendant in the cause, and was merely described in the affidavit as "*A. B.*, the above-named defendant." He referred to rule 5, *Hilary Term, 2 Will. 4.*, by which it is ordered, that "the addition of *every* person making an affidavit shall be in-

It is not sufficient, in an affidavit by the defendant in a cause, to describe him as the "above-named defendant," without any other addition.

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serted therein." He said, that by the old practice of the *King's Bench*, the defendant's addition must have been stated, though, in the *Common Pleas*, the rule was different (a). He submitted, that it was intended by the late rule to make the practice uniform in this respect.

Mansel, contra, contended that the rule could not have been intended to apply to the parties in the cause, and that it was quite unnecessary to give an addition to the defendant, when the plaintiff must be cognizant of his description.

Lord LYNTHURST, C. B.—The object of the rule was uniformity. The safer way is to adhere strictly to the letter of the rules. Upon the whole, we think the affidavit defective.

Rule discharged.

(a) *Jervis's Rules*, p. 53, note (f).

The KING v. The Sheriff of MIDDLESEX, in a cause of
DUNCOMBE v. CRISP.

An informality in the notice of bail does not render the proceeding null, so as to justify the plaintiff in issuing an attachment against the sheriff.

THE notice of bail in this case was informal; and the plaintiff, treating it as a nullity, issued an attachment; against the sheriff.

Price obtained a rule to set aside this attachment; against which—

Erle shewed cause, and contended that the notice was a nullity, and that the attachment was therefore regular.

But the Court said, that the informality did not render the notice a nullity; and made the rule for setting aside the attachment—

Absolute, without costs, the rule not praying for costs.

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BRIGSTOCKE v. SMITH.

ASSUMPSIT for work and labour, money counts, and account stated. Pleas—General issue and statute of limitations.

At the last *Lent* Assizes for the county of *Carmarthen*, before *Patteson, J.*, the plaintiff was nonsuited, with liberty to move to enter a verdict for 68*l.* 3*s.* 8*d.*, if the Court should be of opinion that the following letter was sufficient to take the case out of the statute of limitations:—

“ *Morgan Tin Works,*
“ *Jan.* 28th, 1831.

“ Messrs. *George & Amlot,*

“ Gentlemen,—In reply to your application of the 19th instant, for the payment of 89*l.* 10*s.* 11½*d.* to Mr. *D. Brigstocke*, I beg to say, that it is a claim I am by no means prepared to admit to the full extent, and to make the following observations respecting it. Of that sum, 68*l.* 3*s.* 8*d.* is made up of items for business and materials, stated to have been done and furnished between the years 1817 and 1824, a period during which I was concerned in two successive partnerships, to one or other of whom the accounts Mr. *B.* was entitled to recover ought to have been charged.

“ Having, at different times, wound up both those concerns, and quitted *Carmarthen* as long back as the year

between the years 1817 and 1824, a period during which I was concerned in two successive partnerships, to one or other of whom the accounts Mr. *B.* was entitled to recover ought to have been charged. Having at different times wound up both those concerns, and quitted *Carmarthen* as long back as the year 1824, I was surprised to receive Mr. *B.*'s bill in 1829, five years afterwards; and it is certainly not a little strange, that he should then send in a charge of so old a date, when, if any account was due, it could hardly be expected that the means would remain of ascertaining its correctness. I cannot, therefore, allow, that I am liable to pay any part of the account previous to the year 1825; but, as I anticipate being in *Carmarthen* shortly, I will then communicate with Mr. *B.* personally respecting it. The remainder of the account is for repairs ordered by an agent under the late firm of *Robert Smith & Co.* to be done at the works in *Carmarthen*, in 1827, together with a few items for glazing in the year 1825, making together 204*l.* 17*s.* 5*d.*, which I believe to be correctly charged, and for which I inclose a check, and will thank you to acknowledge the receipt of it.”

An acknowledgment to take a case out of the statute of limitations must be such as will raise the implication of a promise to pay:—*Held*, that the following letter did not raise the implication of a promise to pay, and was not sufficient to take the case out of the statute:—
“ In reply to your application of the 19th instant, for the payment of 89*l.* 10*s.* 11½*d.* to Mr. *D. Brigstocke*, I beg to say, that it is a claim I am by no means prepared to admit to the full extent; and to make the following observations respecting it. Of that sum, 68*l.* 3*s.* 8*d.* is made up of items for business and materials, stated to have been done and furnished

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1824, I was surprised to receive Mr. B.'s bill in 1829, five years afterwards. And it is certainly not a little strange, that he should then send in a charge of so old a date, when, if any account was due, it could hardly be expected that the means would remain of ascertaining its correctness. I cannot, therefore, allow, that I am liable to pay any part of the account previous to the year 1825: but, as I anticipate being in *Carmarthen* shortly, I will then communicate with Mr. B. personally respecting it. The remainder of the account is for repairs ordered by an agent under the late firm of *Robert Smith & Co.*, to be done at the works at *Carmarthen* in 1827, together with a few items for glazing in the year 1825, making together 20*l.* 17*s.* 5*d.*, which I believe to be correctly charged, and for which I inclose a check, and will thank you to acknowledge the receipt of it. I am, Gentlemen, your obedient Servant,

“ *Robert Smith.*”

“ Since writing the above, I thought it would be most convenient to send you a banker's draft.”

John Evans now moved to enter a verdict for the sum of 68*l.* 3*s.* 8*d.*—The only question in this case is as to the effect of the letter. The construction to be put upon it must be the same as before the late statute (a); that was decided in *Haydon v. Williams* (b), where it is said, by *Tindal*, C. J., in delivering the judgment of the Court, “ that statute did not intend, as it appears to us, to make any alteration in the legal construction to be put upon acknowledgments or promises made by defendants, but merely to require a different mode of proof, substituting the certain evidence of a writing, signed by the party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses;” this being the law, and the acknowledgment in the present case being in writing, it only remains to inquire whether such an acknow-

(a) 9 Geo. 4, c. 14. (b) 4 M. & P. 811; S. S. 7 Bing. 166.

ledgment, either in writing or by parol, before the statute, would have prevented the operation of the statute. It has often been observed, that it would have been better never to have gone beyond the letter of the statute; but it is now too late to make that objection. There are several cases which seem to have settled that where a party does not deny the existence of the debt, or uses ambiguous language about it, but says that it is discharged by lapse of time, that is a sufficient acknowledgment to take the case out of the statute, the principle being as stated by Lord *Ellenborough*, in one case, that the statute was meant for the protection of those who lost their proofs of payment, not for those who did not pretend that they had paid at all. *Lloyd v. Maund* (a), *Bryan v. Horseman* (b). In *Colledge v. Horn* (c), the defendant wrote a letter to the plaintiff's attorney to the following effect:—"I have received yours respecting plaintiff's demand. It is not a just one, and am ready to settle the account whenever the plaintiff may think proper to meet me on the business. I am not in his debt 90*l.*, nor anything like that sum; shall be happy to settle the difference by his meeting me."

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BAYLEY, B.—"I am ready to settle the account" is a promise. There is an acknowledgment that something is due, and then the defendant says, when the plaintiff meets him, he will be happy to settle. You will find, in *Kennett v. Milbank* (d) that part of the Court intimated a distinct opinion that an acknowledgment was not sufficient without a promise to pay. You may collect the same from *Haydon v. Williams*. In that case there was a distinct acknowledgment of a debt being due, but there was only a qualified promise to pay. That makes out that a mere acknowledgment is not sufficient to take a case out of the statute of limitations, unless there be a promise to pay—the acknowledgment is

(a) 2 T. R. 760.

Bing. 120.

(b) 4 East, 599.

(d) 1 Moo. & Scott, 102; S. C.

(c) 10 B. Moore, 431; S. C. 3 8 Bing. 38.

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absolute—the promise is qualified. I believe this is the construction which has invariably been put in the late cases on the statute. The principle to be collected from *Tanner and Smart* (a) is this, that the acknowledgment is evidence of a new promise, and constitutes a new cause of action. It was there laid down, that, upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may, and ought to be, implied; but where the party guards his acknowledgment, an implication will not arise. Thus a refusal to pay will prevent the implication of a promise arising from such an acknowledgment; and a conditional promise to pay, when able, will prevent an absolute promise from being implied. *Fearn v. Lewis* (b), *Scales v. Jacob* (c), and *Ayton v. Bolt* (d), establish this, that a mere acknowledgment, though it may, under circumstances, amount to a new promise, yet, if it does not, it is not a sufficient answer to the statute of limitations. Now, in the present case, there is a letter acknowledging that the plaintiff makes a demand, but not acknowledging the propriety of the demand, and denying all liability on his part to make the payment. I think, that where there is such a denial, I cannot make the implication of a promise to pay.

VAUGHAN, B.—In *Frost v. Bengough* (e), it was decided, that it is to be left to the jury to say, whether they can imply a fresh promise from a distinct acknowledgment; but here there is nothing like a distinct acknowledgment. It does not appear to me, that there is here any thing from which a fresh promise can be implied.

The other Barons concurred—

And the rule was refused.

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| (a) 6 B. & C. 602; S. C. 9 D. | Bing. 638. |
| & R. 549. | (d) 12 B. Moore, 305; S. C. 4 |
| (b) 4 M. & P. 1; S. C. 6 Bing. | Bing. 105. |
| 349. | (e) 8 Moore, 180; S. C. 1 Bing. |
| (c) 11 B. Moore, 553; S. C. 3 | 266. |

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SIDDALL v. JOHN RAWCLIFFE.

ASSUMPSIT on a promissory note, dated 12th *December*, 1825, for 100*l.*, payable on demand, with interest.
Plea—The general issue.

At the trial, before *Alderson, J.*, at the last Spring Assizes for the county of *York*, the following appeared to be the facts of the case:

The plaintiff was an innkeeper at *Meltham*, in the West Riding of the county of *York*, and was the trustee of a money-club, called the *Commercial and Building Society*, which was held at his house. The club had been established on the 7th *December*, 1825, by several of the inhabitants of *Meltham*, who agreed to form a fund by quarterly contributions of 2*l.* 2*s.* for each nominal share of 100*l.* When the contributions amount to a sufficient sum, the member who will give the highest premium receives 100*l.*, deducting the premium, and giving a promissory note, signed by himself and two or more sureties for 100*l.* payable on demand. This note is usually given to secure the quarterly contributions, fines, penalties, and interest on the 100*l.*, until the termination of the club by each individual member having received his share in his turn. *Samuel Rawcliffe*, a brother of the defendant, was a member of this club for two shares, one of 100*l.* and one of 50*l.*; at the end of the year 1825, he received his share of 100*l.*, deducting a premium; and he and the defendant, and two others as his sureties, signed the promissory note in question. *Samuel Rawcliffe* continued to pay the fines, contributions, and interest, until 1829, when he became embarrassed; and in *Michaelmas* Term, 1830, an action was commenced by the plaintiff against him and the present defendant, and *Dawson*, as the sureties, to recover 17*l.* 18*s.* the arrears then due. The cause stood for trial at the *Lent* Assizes, 1831; shortly previous to which time, the defendant *John Rawcliffe* applied to the plaintiff's at-

A promissory note for 100*l.*, on the face of it payable on demand, was given to the trustee of a Building Society, to secure certain instalments, fines, and interest. The payee having sued upon the note, took a cognovit for the instalments then due, and costs, which were afterwards paid; and he gave a receipt as for debt and costs in the action:—*Held*, that he could not maintain another action on the note for instalments which subsequently became due.

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torney, and offered to give his own cognovit, for securing payment of the debt and costs, payable in *May* then next. The plaintiff agreed to accept this cognovit, on condition that not only the then arrears, but the arrears due in the preceding *December*, and in *May* and *June*, 1831, should be included. Those sums amounted to 28*l.* 17*s.*, and the costs were made out amounting to 11*l.* 9*s.* 8*d.* The cognovit was in the following form:—

“ In the *Exchequer of Pleas*.

Between *Samuel Siddall* Plaintiff,
and
Samuel Rawcliffe, Joseph Dawson,
and *John Rawcliffe* . . Defendants.

“ I, *John Rawcliffe*, one of the above-named defendants, do confess this action; and that the plaintiff hath sustained damages to the amount of 200*l.*, besides his costs and charges as between attorney and client, to be taxed by the Master; but no judgment is to be entered up or execution issued, until the 23rd day of *May* next, in default of the payment of the sum of twenty-eight pounds seventeen shillings, being the debt in this action, together with the said costs; and I hereby agree, that no writ of error shall be brought, or bill in equity filed, to hinder or delay the said plaintiff from suing out execution as aforesaid: and that in case the said plaintiff shall enter up his judgment in default of payment, he shall be at liberty to levy the said sum of twenty-eight pounds seventeen shillings, together with the costs, sheriff's poundage, and all other incidental expenses.

Dated the 12th *February*, 1831.

Witness, *J. B. Wilkinson*.

(Signed) *J. Rawcliffe*.

On the 31st day of *May* the present defendant, *John Rawcliffe*, paid to the plaintiff's attorney the sum of 40*l.*

for debt and costs, pursuant to the cognovit, and took the following receipt:—

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“ *Siddall v. Rawcliffe.*

“ Received, 31st day of *May*, 1831, of Mr. *John Rawcliffe*, one of the above-named defendants, the sum of forty pounds, in discharge of the debt and costs in this action.

Whitehead & Robinson,
Plaintiff's attorneys.”

No judgment was ever entered up in the action against *Samuel Rawcliffe* and others. The present action was brought for 16*l.* 15*s.*, being the amount of contributions, &c. from 1st *June*, 1831, to 5th *September*, 1832, and for 3*l.* 6*s.* for fines incurred during that period.

The learned Judge thought that a second action was not maintainable on the note after the cognovit, and payment and receipt in the former action; and, under his direction, the plaintiff was nonsuited, with leave to him to move to enter a verdict for 16*l.* 15*s.* or 20*l.* 1*s.* 6*d.*

Alexander now moved accordingly.—It was competent for the plaintiff to prove by parol that the payment and receipt were applicable to the amount of the instalments for which the cognovit was really given. Here, no judgment was entered up on the cognovit, and the receipt might be explained by parol. If judgment had been entered up on the cognovit, it might be different, but until that was done it could not be pleaded in bar, and was not conclusive in evidence. In the first action the plaintiff could only sue for the instalments then due, he could not have received the 100*l.*

LORD LYNDEHURST, C. B.—The note here is in the simple and ordinary form. Your object is to give it quite a different character, and to make it a new contract. Can you do that by parol evidence? How can you hold a common

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promissory note as a continuing guarantie? You can only sue once upon it. You cannot have a remedy in two actions upon one note.

BAYLEY, B.—The right to sue on a note like the present is entire. You would say, that, having once recovered to a limited amount only, you can never sue for the remainder; but that would be to contradict by parol the terms of your cognovit and receipt. You may explain by parol, but you cannot contradict. Those documents describe 25*l.* as the whole of the debt due. You never could have had more than one remedy on this note. The party gives a cognovit, by which you have got the benefit of a judgment—a judgment would have merged the original demand, and as it would have passed *in rem judicatam*, you could no longer have sued upon the security. How can we tell whether the party would have given the cognovit, unless the note had been extinguished, as it would have been by a judgment. Your difficulty is this, that you had one remedy only by action on this note, upon which you never could have sued but once. Then you bring an action and take a cognovit, in which the debt is described as being 28*l.* 17*s.*, and you give a receipt for the debt and costs in that action. It would be very difficult to say that the sum you have received in that action was not the amount of the debt and costs. If you had taken a note payable by instalments you might have sued as those instalments became due; but you have taken your security in the form of a note, which gives one remedy only.

Rule refused.

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SARJEANT *v.* COWAN and Another.

THIS was an action of *assumpsit* for money had and received—Plea, the general issue. At the trial before *Gurney, B.*, at the last *Middlesex* sittings, the following appeared to be the facts of the case.

The defendants were Sheriff of *Middlesex*, and had recovered a verdict and judgment in an action of debt on a bail bond against a man of the name of *Widgeon*. Upon this judgment they issued a *fi. fa.* against the goods of *Widgeon*, directed to the Coroner of *Middlesex*. The attorney of the sheriff indorsed on this writ the name of *Simpson*, who was an officer of the Sheriff of *Middlesex*; and the usual course of the office to indorse on a writ to the sheriff the name of the officer who is to execute it, was proved. Under the *fi. fa.* a barge was seized, as the goods of *Widgeon*, and sold by the broker for the coroner to the plaintiff, from whom it was afterwards taken by persons claiming property in it. The plaintiff paid the broker, who paid *Simpson*; the latter was called, and proved that he had not paid the money over to the defendant, but that he retained it for reasons which he gave. The plaintiff having brought this action to recover the amount he had paid for the barge, as on a failure of consideration, the learned Baron thought that *Simpson* was the officer of the coroner and not of the defendants, and that the defendants were not connected with the transaction, and accordingly nonsuited the plaintiff.

J. Williams now moved for a rule to shew cause why the nonsuit should not be set aside; and contended, that *Simpson* was proved to be the agent of the sheriff for the execution of the writ.

Lord LYNDHURST, C. B.—He acted in this instance

A *fi. fa.*, directed to the coroner, issued on a judgment obtained by a plaintiff, and the plaintiff's attorney indorsed thereon the name of *S.*, an officer of the sheriff, who, after the goods seized under the *fi. fa.* had been sold, received the proceeds from the broker, and did not hand them over. A person, who had bought goods at the sale, which had been seized under the *fi. fa.*, but which were afterwards claimed by a third party and taken away from him, brought an action against the sheriff for the purchase-money paid by him, the consideration having failed:—*Held*, that *S.* was not the officer of the sheriff but of the coroner, and that the defendant was not connected with the proceedings so as to be liable.

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as the officer of the coroner. I suppose that the sheriff, in such instances, allows the coroner to make use of his machinery, but then it is *pro hac vice* the machinery of the coroner. The coroner is bound by law to execute the writ.

BAYLEY, B.—Can you put it higher than this—that by putting the name of *Simpson* upon the writ, the attorney requested the coroner to employ *Simpson* to execute it. When the coroner complies with the request in so employing him, he becomes the coroner's officer.

GURNEY, B.—It did not even appear at what time the name was indorsed on the writ.

Rule refused.

ALSTON v. UNDERHILL.

Since the uniformity of process act, suing out the writ of summons is the commencement of the action for all purposes.

Where the defendant was arrested on the 1st April, and, owing to Easter Monday and Tuesday falling on the 8th and 9th, had the 10th to put in bail, and the plaintiff on the 10th took an assignment of the bail-bond, and issued a writ of summons against the bail, the Court set aside the proceedings on the bail-bond.

THESISIGER had obtained a rule to shew cause why the proceedings on the bail-bond should not be set aside for irregularity, on the ground that the writ in the action on the bail-bond had been issued too soon.

Erle shewed cause.—This question arises out of the recent statute 2 Will. 4, c. 39, s. 11, which enacts, that, if any writ of summons, *capias*, or detainer, issued by authority of this act, shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may, except as therein excepted, be had thereon without delay, at the expiration of eight days from the service or execution thereof, on whatever

day the last of such eight days shall happen to fall, whether in term or vacation;" and, after providing, "that if the last of such eight days shall happen to fall on a *Sunday* or *Christmas-day*, &c., the following day is to be considered the last of such eight days," the act goes on to provide, "that, if the last of such eight days shall happen to fall on any day between the *Thursday* before, and the *Wednesday* after *Easter-day*, then, and in every such case, the *Wednesday* after *Easter-day* shall be considered as the last of such eight days." Here, this case came within the exception. The *Wednesday* after *Easter-day* was the 10th, and therefore the time for putting in bail expired on that day, and the plaintiff was at liberty to commence proceedings on the bail-bond on that day. The writ is not served till the 11th. [*Bayley*, B.—Here the writ is sued out on the 10th. It is not when the writ is served, but when it is sued out, that the action is commenced.] In Serjeant *Williams'* note to the case of *Mellor v. Walker*, 2 *Saunders*, 1 d, it is laid down thus: "In general cases the *bill* is the commencement of the action, and the *latitat* is only to bring the party into Court, and in that view it is held that a *latitat* may be sued out before there is any cause of action. [*Bayley*, B.—That is, you might have given evidence of any cause of action accruing before the bill filed.] In *Best v. Wilding* (a), it was held that even in bailable process the bill was the commencement of the action, and that if the plaintiff proved a cause of action before bill filed, though after the writ was sued out, it was sufficient as well in bailable as in common writs. [*Bayley*, B.—But now by the act of Parliament the writ of summons is the commencement of the action.] That has not yet been decided. It is apprehended that the summons may be sued out, and the plaintiff may wait until

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the action accrues. A *latitat* was not considered to be a commencement of the action, except as an answer to the statute of limitations; and, it is submitted, that the summons only operates from the service, except in the case of the statute of limitations being pleaded, when it might be replied as an answer to that plea.

BAYLEY, B.—You may take your assignment the moment the bail-bond is executed; but you ought not to sue out your writ until default is made. If the time for putting in bail expires on the 10th, you ought not to sue out your writ against the bail until the 11th. Since the late act of Parliament, there is no doubt that the suing out the summons is the commencement of the suit for every purpose.

The other Barons concurred, and the rule was made—

Absolute, with costs.

ISAACS v. GOODMAN.

Where issue was joined in *Easter Term*, and notice of trial given for the second sittings in the same term, and the plaintiff did not proceed to try, but gave notice of countermand, and the defendant moved the same term for judgment as in case of a nonsuit:—*Held*, that the motion was premature.

THOMAS moved for judgment as in case of a nonsuit. Issue had been joined in the present *Easter Term*, and notice of trial given for the second sittings. The plaintiff did not proceed to try, but gave notice of countermand.

GURNEY, B., (sitting alone), thought the motion premature; but mentioned the case to the full Court, who, after referring to the Master, said, that the plaintiff was not bound to take more than one step in a term, and that the motion was premature.

Rule refused.

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MOULD v. MURPHY.

R. V. Richards obtained a rule to set aside a judgment, on the ground that no rule to plead had been given in the term in which judgment had been signed. The writ was issued in vacation, and the declaration was delivered, and a rule to plead given, in the same vacation.

Archbold shewed cause, and contended that it was not necessary to give a new rule to plead in the ensuing term.

To which the Court agreed, and discharged the rule.

When a writ issued in vacation, and a declaration was delivered, and rule to plead given in the same vacation, but the plaintiff did not sign judgment until the ensuing term:—*Held*, that it was not necessary to give a new rule to plead in that term.

FEATHERSTONHAUGH and Another, Assignees &c. v. REEN.

PARKER and *Smith*, attornies, became bankrupt. The defendant, a client, who owed them a bill, applied to a Judge for an order upon the assignees to tax the bill, which had been delivered, which the Judge refused. An action being afterwards brought by the assignees, the defendant obtained an order to tax the bill, on an undertaking to pay the amount taxed, with the costs of the action. More than a sixth was disallowed on taxation. In taxing the costs of the cause, the officer allowed the costs of taxing the bill as costs in the cause. On motion to review the taxation, the Court directed the officer to disallow the costs of taxation.

In an action on an attorney's bill by the assignees of the bankrupt's attorney, an order for taxing the bill was obtained, on an undertaking to pay the amount taxed, with the costs of the action. More than one sixth of the bill having been disallowed:—*Held*, that the costs of taxation could not be allowed to the plaintiff as costs in the action.

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ROPER *v.* SHEASBY and Another.

A vendor arresting the vendee for the full amount of goods sold and delivered, is not liable to pay costs under the 43 Geo. 3, c. 46, s. 3, although part of the goods sent on approval had been returned to the vendor, and accepted by his servant, it not appearing that the vendor had personal notice of such return and acceptance.

IN this case the plaintiff, on the 6th of *March* last, had arrested the defendants for the sum of 48*l.* 12*s.* 3*d.*, and recovered at the trial only 44*l.* 8*s.* 3*d.* It appeared from the affidavits, that goods had been supplied by the plaintiff to the defendants to the amount for which they had been arrested; but that a tea urn, of the value of 4*l.* 4*s.*, part of the articles supplied, and which had been sent on sale or approval, had been returned by the defendants to the plaintiff, and delivered to his shopman on the 24th of *September*, 1832. An application was made for payment of the 48*l.* 12*s.* 3*d.* to one of the defendants, who said he would look over the accounts delivered, and that, if they were correct, they should be arranged; but, it did not appear that the defendants had ever informed the plaintiff that the urn had been returned.

Manning now moved for a rule, to shew cause why the defendants' costs should not be taxed and paid by the plaintiff to the defendants, pursuant to the 43 Geo. 3, c. 46, s. 3. The question is, whether the act is imperative; because, it is admitted that the defendants are not in a situation to ask the Court in its discretion to grant the application. The statute says, s. 3, that, "in all actions wherein the defendant shall be arrested and held to special bail, and wherein the plaintiff shall not recover the amount of the sum for which the defendant shall have been so arrested and held to special bail, such defendant shall be entitled to costs of suit, provided it shall be made appear, to the satisfaction of the Court in which such action is brought, upon motion to be made in Court for that purpose, and upon hearing the parties by affidavit, that the plaintiff in such action had not *any reasonable or probable cause* for causing the defendant to be arrested and

held to special bail in such amount as aforesaid; and provided such Court shall thereupon by a rule or order of the same Court direct that such costs shall be allowed to the defendant or defendants." It is submitted, that the act is imperative that a party shall not be arrested for more than is really due. [*Gurney, B.*—It never has been decided, that a mere farthing difference will entitle the defendant to his costs.] In *Day v. Picton* (a), where a plaintiff had sold goods to the defendant, to be paid for half in ready money and half by bill at three months, and the defendant had refused to pay the half in ready money, and the plaintiff arrested him for the full price of the goods, it was held, that he had no reasonable or probable cause for so doing, and that the defendant was entitled to his costs. In that case, the defendant had been selling the goods at an under price, clearly shewing that he meant to defraud the plaintiff; yet, the Court thought that they were bound, by the words of the statute, to award the defendant his costs. And, in *Donlan v. Brett* (b), it was held, that, in order to entitle the defendant to costs, it was sufficient to shew that the plaintiff had no reasonable or probable cause for procuring the defendant to be arrested for *that sum*, and that it was not necessary to shew malice. It is submitted, that the act is imperative, that a party shall not arrest his debtor for more than is due. It is just that a plaintiff who arrests a defendant should do it upon the peril of paying costs, if by the neglect or omission of himself, or of those whom he employs, the defendant is wrongfully placed under the necessity of finding bail for a larger sum than he owes. The extent of the excess cannot affect the rule. The proviso at the end of the clause was not intended to vest any discretion in the Court, but merely to point out by what process the object of the Legislature should be effected.

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(a) 10 B. & C. 120; 5 Mann. & Ryl. 31. (b) 10 B. & C. 117; 5 Mann. & Ryl. 29.

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BAYLEY, B.—It is clear in this case that the plaintiff had reasonable and probable cause for arresting the defendants for this amount. The plaintiff had delivered goods to the defendants to the amount of 48*l.* 12*s.* 3*d.*; the defendants had returned goods to the amount of 4*l.* 4*s.*; but it does not appear that the plaintiff was ever informed of it. If the defendants had shewn that they informed the plaintiff that the urn had been returned, it might have altered the case; but here there was no communication, and the plaintiff is suffered to act under the impression that the whole sum remained due. In both the cases which have been relied on there was no reasonable or probable cause for arresting for the amount. Here, goods are delivered to the amount of 48*l.* 12*s.* 3*d.*; there is a demand of 48*l.* 12*s.* 3*d.*, and no intimation is given to the plaintiff that any part of the goods so delivered had been returned. The defendants knew that the goods had been returned, and might have informed the plaintiff of that circumstance.

VAUGHAN, B.—I do not think that the terms of this act render it imperative on the Court to grant the defendant his costs in every case where the plaintiff happens to arrest for more than on the trial is proved to be really due. The further proviso shews that it is to be left to the discretion of the Court. Here, there is no pretence for saying that there was any vexation or oppression.

BOLLAND, B.—I am of the same opinion. If the rule were, as contended for, it would have been useless to leave any discretion in the Court, which the words of the act expressly contemplate.

Rule refused.

And see *Stovin v. Taylor*, 1 Nevile & Manning, 250.

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LAWSON v. ROBINSON.

HUTCHINSON, on a former day, had obtained a rule to shew cause why the verdict for the plaintiff, taken in this case at the last Assizes for *Yorkshire*, should not be set aside and a new trial had.

Short notice of trial, in country causes, means in all cases four days peremptorily.

Alexander now shewed caused.—This rule was obtained on the ground, that the defendant being under terms to take short notice of trial, a notice less than four days before, and exclusive of, the commission day was given, and consequently that the plaintiff was not entitled to try. But it appears from the affidavits that the defendant did not deliver his rejoinder until the 26th of *February*, and consequently the plaintiff was not bound to give notice until the 27th. This undoubtedly was not four days before, and exclusive of, the commission day, which was the 2nd *March*; but it is occasioned by the defendant's own delay; and when that is the case the defendant cannot take the objection. Short notice of trial does not necessarily mean four days under all circumstances, but four days only, provided the defendant be not instrumental in contracting that period. There is certainly no direct authority to that effect, but it has long been the understanding of the profession.

Sed per Curiam.—Short notice of trial, in country causes, means four days peremptorily. The rule 58, *H. T. 2 Will. 4*, has expressly provided that it shall be taken to mean four days. If, from the state of the pleadings, the parties cannot get to trial without less notice being sufficient, they ought to make that the terms of the order.

Rule absolute.

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IN THE EXCHEQUER CHAMBER.

BARDONS and Another *v.* SELBY.

[*In Error from the Court of King's Bench.*]

DECLARATION in replevin for taking the plaintiff's goods and chattels in *Verulam Buildings; Gray's Inn*, in the county of *Middlesex*, and detaining the same against sureties and pledges. The fourth avowry and cognizance stated that the defendant below, *Bardons*, in his own right as collector of the poor-rates of that part of the parish of *St. Andrew, Holborn*, which lies above the bars, in the county of *Middlesex*, and of the parish of *St. George the Martyr* in the said county, well avowed, and the other defendant below, as his bailiff, well acknowledged the taking and detaining of the goods in the declaration mentioned, because, long before the time of such taking and detaining, and before the ascertaining and making of the rate thereafter mentioned; and thenceforth continually until the time of such taking and detaining, the plaintiff below was an inhabitant of the said part of the parish of *St. Andrew, Holborn*, and by law rateable to the relief of the poor of that part of the said parish, and of the parish of *St. George the Martyr*, in respect of his occupation of a tenement situate in the said place in which, &c., and within the said part of the parish of *St. Andrew*; that a rate for the relief of the poor of that part of *St. Andrew, Holborn*, and of the parish of *St. George the Martyr*, was duly ascertained, made, signed, assessed, allowed, given

An avowry stated that the plaintiff below was an inhabitant of a parish, and rateable to the relief of the poor in respect of his occupation of a tenement situate in the place in which, &c.; that a rate for the relief of the poor of the said parish was duly made and published, in which the plaintiff below was in respect of such occupation duly rated in the sum of 7*l.*; that he had notice of the rate, and was required to pay, but refused; that he was duly summoned to a petty sessions to shew cause why he refused; that he appeared, and shewed no cause, whereupon a warrant was duly made under the hands of two justices of the peace, directed to one of the defendants below, requiring him to make distress of the plaintiff's goods and chattels; that the warrant was delivered to the defendant, under which he, as collector, justified taking the goods as a distress, and prayed judgment and a return. Plea in bar, *de injuriâ suâ propriâ absque tali causâ*. To this there was a special demurrer, assigning for cause, that the plea offered to put in issue several distinct matters, and was pleaded as if the avowry consisted merely in excuse of the taking and detaining, and not as a justification and claim of right:—*Held*, that the plea in bar was good.

notice of, and published according to the statutes; and that by the said rate the plaintiff below was, in respect of such inhabitancy and occupation as aforesaid, duly rated in the sum of 7*l.*; that *Bardons*, as collector, gave him notice of the rate, and demanded payment, which he refused; that the plaintiff below was duly summoned to appear at the petty sessions of the justices of the peace for the said county, to be holden at a time and place duly specified, to shew cause why he refused payment; that he appeared, and shewed no cause; that a warrant was duly made under the hands and seals of two justices of the peace for the county then present, directed to *Bardons* as collector, requiring him, according to the statute, to make distress of the plaintiff's goods and chattels; that the warrant was delivered to *Bardons* to be duly executed. By virtue of which warrant, and in execution thereof, he, as collector, avowed, and the other defendant below, as his bailiff, acknowledged the taking of the goods as a distress, and prayed judgment and a return of the goods. The plaintiff below pleaded in bar that the defendants of their own wrong, and without such cause as they had in their avowry and cognizance alleged, took the plaintiff's goods and chattels, &c. To this plea there was a special demurrer, and the causes assigned were, that the plea in bar tendered and offered to put in issue several distinct matters,—the inhabitancy of the plaintiff below; his chargeability to the relief of the poor, in respect of his occupation mentioned in the avowry and cognizance; the ascertainment, making, signing, assessing, allowance, notice, and publication of the rate; the rating and assessment of the plaintiff below; the notice to him of the rate; the demand and refusal of the sum assessed; the summons, the appearance before the justices, the warrant of distress, and delivery thereof to the defendant *Bardons*. Another cause assigned was, that the plea in bar was pleaded as if the avowry and cognizance consisted wholly *in excuse* of

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the taking and detaining, and did not avow and justify the same, and claim a right to the goods and chattels by virtue of the statutes. The fifth and sixth avowries and cognizances were, in substance and form, similar to the fourth, and to those avowries and cognizances the plaintiff also pleaded the general plea *de injuriâ*; and there were special demurrers, assigning the same causes as those assigned to the fourth. The plaintiff joined in demurrer.

The Court of *King's Bench*, Lord *Tenterden*, C. J., *dissentiente*, gave judgment for the plaintiff below, deciding that the pleas in bar were good. Upon this judgment the defendants below brought a writ of error, which was argued in the vacation after last *Hilary Term* by *Coleridge*, Serjt., for the plaintiffs in error, and by *W. H. Maule*, for the defendant in error; when the Court took time to consider, and their judgment was now delivered by—

TINDAL, C. J.—The question raised for our consideration upon this writ of error arises in an action of replevin in which *Bardons*, one of the defendants below, avows as collector of a poor rate, and *Jenkins*, the other defendant, makes cognizance as his bailiff; alleging, in the fourth avowry and cognizance, that the plaintiff was an inhabitant of the parish, and by law rateable to the relief of the poor thereof in respect of his occupation of a tenement situate within the same—that a rate for the relief of the poor of the said parish was duly ascertained, made, signed, assessed, allowed, given notice of, and published according to the statutes; and that by the said rate the plaintiff was duly rated in the sum of 7*l.*; that *Bardons*, as collector, gave him notice of the rate, and demanded payment, which he refused; that the plaintiff was duly summoned to appear at the petty sessions, to be held at a time and

place duly specified, to shew cause why he refused; that he appeared and shewed no cause; that a warrant was thereupon duly made under the hands and seals of two justices of the peace for the county then present, directed to *Bardons*, the collector, commanding him, according to the statute, to make distress of the plaintiff's goods and chattels; that the warrant was delivered to *Bardons*, under which he, as collector, avowed, and the other defendant acknowledged, the taking of the goods, praying judgment and a return, &c. The plaintiffs pleaded in bar that the defendants, of their own wrong, and without such cause as was alleged, took the plaintiff's goods and chattels. To this plea there was a special demurrer, assigning for cause that the plaintiff, by his plea in bar, sought to put in issue several distinct matters, and also that the plea in bar was pleaded as if the avowry and cognizance consisted wholly in excuse of the taking and detaining, and did not avow and justify the same, and claim a return. The plaintiff below joined in demurrer. There were other avowries and cognizances pleaded in a similar form, to which similar pleas in bar were pleaded, and to which also there were special demurrers and joinders in demurrer. Upon argument before the Court of *King's Bench*, judgment was given in favour of the plaintiff below by two of the learned Judges of that Court, the late learned and much lamented Chief Justice Lord *Tenterden* having given judgment in favour of the defendants below; and the question raised upon the record for our determination is this, whether the general plea in bar pleaded by the plaintiff below, by which all the several matters alleged in the avowry are put in issue, is a good plea in bar or not; and we are all of opinion that such plea in bar is a good plea, and that the judgment of the Court below must be affirmed.

It may be convenient, in the first place, to advert to the objection which relates to the form of action in which this general plea is used, namely, that it is in point of form

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an action of replevin, not an action of trespass; as to which we are of opinion that no sound distinction can be made in that respect; but that, wherever the facts pleaded in bar to an action of trespass for taking goods constitute such a defence, the plaintiff may, consistently with the rules of law, put the whole of them in issue by the general replication *de injuriâ suâ propriâ absque tali causâ* we think the plaintiff may also do the same in his plea in bar to an avowry, stating the same identical facts as a defence in an action of replevin. No case has been cited before us in which such general traverse of the facts stated in the avowry has been held bad simply upon the ground that the form of action is in replevin, not trespass. For as to the case of *Jones v. Kitchen* (a), the general traverse there pleaded in bar to an avowry for a distress for rent, and which was held bad in that case, would have been equally held bad if it had been replied to a special plea in trespass, stating the same facts, as appears from the case of *White v. Stubbs* (b). It cannot, therefore, as it appears to us, be a safe ground of decision to rest the validity of the general traverse, on the present occasion, not upon the nature and character of the facts which are put in issue by such traverse, and upon the broad question whether they constitute one single defence or not, but, upon the consideration that the question arises in an action of replevin; the only ground of distinction that has been suggested is, that the defendant, in this case, by claiming a return of the goods, asserts a right and property in them, and therefore brings the case within the exceptions in *Crogate's* case, "that the defendant claims property or an interest in or out of the goods which have been taken." But, upon reference as well to *Crogate's* case, where this exception to the general rule is laid down, as also to the several cases in which such excep-

(a) 1 Bos. & Pull. 76.

(b) 2 Saund. Rep. 294.

tion has been held to apply; we think it is limited to instances in which the defendant has claimed by his plea an interest in the land or the goods before and at the time of the trespass complained of. In replevin, however, it is obvious that the defendant does not insist, in ordinary cases at least, and certainly not in the present case, upon any right or interest he possessed in the goods before or at the time of the taking complained of. In the instance of a distress for rent in arrear, the very nature of the transaction assumes that he has seized the goods which belonged to his tenant, the plaintiff; his sole object being to satisfy the rent out of the tenant's property; and the prayer for a return of the goods, &c., is no assertion of right to or interest in the goods in himself the defendant; but is a prayer that the plaintiff's goods may be returned by the sheriff, in order so long as the common law on this subject continued, that they might be kept by the defendant as a pledge for the payment of the rent; and since the alteration of the common law by the statutes 2 Will. & M., c. 5, in order that they may be sold by the defendant in satisfaction of the arrears of rent and the expenses. Indeed, it is evident that the claim of interest mentioned in *Crogate's* case, as forming an exception to the application of the rule there laid down, must mean an interest anterior to and independent of the fact of seizure, from the instances which are there put of a right of common, or a right of way or passage, and the like; all of which, from their nature, must have existed in the party before the trespass was committed for which the action is brought. We think, therefore, no distinction can be satisfactorily laid down between the rule of pleading, as to the point in question, in an action of replevin and an action of trespass, but that the point to be determined is, whether, by the rules of pleading, the several facts alleged in the fourth avowry might have been put in issue by the general traverse, if they had been contained in a plea in bar to an action of trespass.

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And although it may be very difficult, upon principle, to account for such a departure from the general object which the rules of special pleading have in view, namely, that of bringing the matter in dispute between the litigant parties to one certain and single issue of fact; yet, we think the present case falls within the authority of judicial decisions of an early date, and which have been constantly adhered to in later times. And we feel ourselves on that account bound by their authority, and no longer at liberty to found our judgment upon the ground of expediency, where the point in dispute is of a nature and description rather to be governed by precedent than by general principles of law. It is not necessary to refer to any earlier decision than that of *Crogate's case* (a), as an authority upon the present question. Indeed, the Year Books cited in that case do not, upon reference, throw much light or any degree of certainty on the points there resolved. But from the time of *Crogate's case* (6 *James* 1), down to the present period, the resolutions of the Court made in that case have, as to the greater part, been considered to be law. In *Crogate's case*, the defendant, in an action of trespass for driving the cattle of the plaintiffs, pleaded a right of common in a copyholder over the *locus in quo*, by prescribing in the usual way, in the name of the lord of the manor; and because the plaintiff had wrongfully turned his cattle there, the defendant as servant of the copyholder, and by his command, justified driving the cattle out. To this plea the plaintiff replied *de injuriâ suâ propriâ absque tali causâ*; and upon demurrer it was adjudged that the general replication in that case was insufficient; and Lord *Coke* then proceeds to lay down four resolutions of the Court, in the course of which he thus states the nature of this general plea, *viz.* the general plea *de injuriâ suâ propriâ, &c.* is

(a) 8 Co. 67.

properly when the defendant's plea doth consist merely of matter of excuse, and of no matter of interest whatever. *Esch. Chamber, 1833.*

The resolutions of the Court are these four—*first*, that *absque tali causâ* doth refer to the whole plea and not only to the commandment, for all makes but one cause, and any of them without the other is no plea by itself;—*secondly*, it was resolved, that when the defendant in his own right, or as servant of another, claims any interest in the land, or to any common, or rent going out of the land, &c. there *de injuriâ suâ propriâ*, &c. generally is no plea; but if the defendant justifies as servant, there *de injuriâ suâ propriâ*, &c. in some of the cases, with a traverse of the commandment, that being made material, is good. *Thirdly*, it was resolved, that when, by the defendant's plea, any authority or power is mediately or immediately derived from the plaintiff, there, although no interest be claimed, the plaintiff ought to answer and shall not reply generally *de injuriâ suâ propriâ*. The same law of an authority given by law, as to view waste, &c. *Lastly*, it is resolved, that, in the case at bar, the issue would be full of multiplicity of matter, where an issue ought to be full and single; for, parcel of the manor, demisable by copy, grant by copy, prescription of common, &c., and commandment, will be all parcel of the same.

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The questions therefore appear to us to be these two alone—*First*, whether the facts pleaded in this avowry bring it within that description of plea to which the general replication is admitted in *Crogate's* case to apply; and *Secondly*, whether the case falls within any of the exceptions laid down by the Court in their resolutions in that case. Now, the facts stated in the avowry are the inhabitancy of the plaintiff in a certain parish, and his liability to the poor rate, by reason of occupation; the making of a poor rate for the parish, with all the particular observances as required by law; notice of the rate, the de-

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mand of payment, and refusal to pay, the summoning before the Justices of Peace in Petty Sessions, to shew cause for his refusal where no cause was shewn; the issuing of a warrant by the Justices of the Peace, the delivery of the warrant to one of the defendants, and the distress made by him and the other defendant as his bailiff. In the first place these facts appear to us, in the language of *Crogate's* case, to consist merely "upon matter of excuse and of no matter of interest whatsoever;" they fall within the principle of a justification under a proceeding in the Admiral's Court, the hundred or county court, or any other which is not a Court of record, where *de injuriâ*, &c. generally is good; "for all is matter of fact, and all make but one cause," as is stated in another part of the same report. The case now under discussion resembles closely that which is last referred to; a justification under a distress warrant for a poor rate must surely be the subject of a general traverse, if a justification under the process of the Admiralty Court is held to be so.

It remains to be considered, therefore, whether the subject-matter of the avowry brings it within any of the exceptions which are laid down in the leading case above referred to. The first is, where the defendant in his own right, or as servant to another, claims any interest in or out of the subject-matter of the action of trespass, in which case the general traverse would be bad. The interest there spoken of would include any title by lease, licence, or gift from the plaintiff (a), or any sub-demise to the defendant (b). The answer, therefore, to this objection appears to be, that the defendants in this case claim no such interest, nor any other interest of any kind, in the goods taken; for, that the exception applies only to the case of title or property in the goods, independently of any right conferred by the act of seizure, we have already stated to be our

(a) Bro. Abr. tit. "*De son tort demesne*, 41. (b) 12 Mod. 582.

opinion, to which we refer. The next exception is, where the defendant justifies under any authority or power, mediately or immediately derived from the plaintiff; in which case it is said, that although no interest is claimed, the plaintiff ought to answer it, and shall not reply generally, *de injuriâ suâ propriâ*. It would not have been necessary to have adverted to this exception, as the proceedings on the part of the defendants are manifestly not under any authority from the plaintiff, but directly against him, if Lord Coke had not proceeded to add, "the same law of an authority given by the law, as to view waste." But the meaning of this distinction is explained by Lord Holt, in the case of *Chancey v. Win (a)*, who says—"The case of entering to see waste is upon a special reason; for, suppose the lessor were seised in fee, such seizure in fee would be involved in the issue." That the *dictum* of Lord Coke cannot be intended of justification under *all* authorities in law, generally, is abundantly clear from the instances already adverted to, of justifications under process of law against the person and against the goods of the plaintiffs; so, also, of justifications by peace officers arresting upon breach of the peace, and the like; so, also in the case of justification under a statute (see *Chancey v. Win, supra*); in all which cases the general traverse is invariably replied to such pleas, where no matter of record forms part of it. If so, why may it not equally be replied where the justification is under a distress for a poor's rate, being an authority of law?

The last of the exceptions mentioned in *Crogate's case* is, that the plea would be full of multiplicity of matter. Whether this is or is not a ground of exception that applies to the present case, must depend upon the meaning of the word 'multiplicity' in the resolution. If it intends, that separate and distinct facts constituting altogether one defence,

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(a) Bro. Abr. Ibid. 53.

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cannot be included in the general replication, what becomes of the rule in *Crogate's* case altogether? Why did the discussion in *Crogate's* case take place; and why were the four resolutions made, when the single objection, that the plea included more than one separate fact, would have been sufficient to have determined against the general traverse? How is this interpretation reconcileable with the various instances in which this general form of replication is confessedly held good, such as the justification under process issuing out of a Court not of record? Where facts are stated in the plea, mixed up with matter of record, or with the claim of interest, or under the authority of the plaintiff, it has always been allowed, that the plaintiff might admit the fact which falls within the description of such exceptions, and traverse the remainder of the allegations of the plea by limiting the traverse by the words '*absque residuo cause.*' How could this practice of pleading be applied to the present case, where none of the facts alleged fall within the exception, and all the facts are of the same nature? It follows, therefore, that such cannot be the meaning of the word 'multiplicity,' and, consequently, that the resolution does not apply to this case; and such appears clearly to have been the opinion of the Court of *King's Bench* in two modern cases: *Robinson v. Raley* (a), and *O'Brien v. Saxon* (b). Upon the whole, we think the case falls within the general rule laid down in *Crogate's* case, and that it is not touched by any of the exceptions there adverted to; and, consequently, that the judgment of the Court below must be affirmed.

Judgment affirmed.

(a) 1 Burr. Rep. 316.

(b) 2 B. & C. 908.

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WHITELOCKE v. FRANCIS MUSGROVE.

ASSUMPSIT against the defendant, as maker of a promissory note: plea, general issue. At the trial at the *London* sittings in *Michaelmas* term last, before *Bayley*, B., it appeared that the subscribing witness to the note had gone to reside in *America*. The note appeared on the face of it to be signed with "the mark of *Francis Musgrove*." The hand-writing of the attesting witness was proved; but the witness, who proved the hand-writing of the attesting witness and his residence in *America*, said, that he knew nothing of *Francis Musgrove* or of the mark; and no further evidence being given, the learned Baron thought the evidence not sufficient: he left the case, however, to the jury, stating that he thought that the attestation imported that some person of the name of *Francis Musgrove* had signed the note, but not that the defendant was that person. The jury under this direction found a verdict for the defendant; leave being given by the learned Baron to the plaintiff to move to enter a verdict for the amount of the note.

In an action upon an instrument, the subscribing witness to which is dead or resides abroad, it is necessary, besides proving the hand-writing of the subscribing witness, to give some evidence of the identity of the party sued with the party who appears to have executed the instrument (a).

Milner, in *Michaelmas* Term last, obtained a rule *nisi* accordingly, against which cause was now shewn by—

Wightman and *Addison* for the defendant.—If proof of identity is requisite in any case, it ought particularly to be required in a case like the present, where the party signing is a marksman. Where a party has signed his name himself, a defendant has the power of calling witnesses acquainted with his real hand-writing, who may prove, if the truth be so, that the hand-writing to the note is not his; but a party charged with having signed as a marksman has not this opportunity; and it is impos-

(a) The same point was ruled in another case which stood over for the decision of this.

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sible for him to disprove the mark. In *Nelson v. Whittall* (a), *Bayley, J.*, said, "It is laid down in *Mr. Phillips's* treatise on the Law of Evidence, that proof of the hand-writing of the attesting witness is in all cases sufficient. I always felt this difficulty, that that proof alone does not connect the defendant with the note. If the attesting witness himself gave evidence, he would prove, not merely that the instrument was executed, but the identity of the person so executing it; but the proof of the hand-writing of the attesting witness establishes merely, that some person, assuming the name which the instrument purports to bear, executed it; and it does not go to establish the identity of that person; and in that respect the proof seems to me defective." It is true that the late Lord Chief Justice, then *Mr. Justice Abbott*, observed, "I am by no means prepared to say that proof of the hand-writing of an attesting witness is not sufficient. If it had been necessary in ancient deeds to prove besides the hand-writing of an attesting witness that of the party also, a great difficulty would have arisen; for in those times the parties seldom wrote, but merely fixed their marks, which would scarcely be distinguishable from one another." The argument, from the difficulty of proving the hand-writing of the party, seems to assume that proof of the hand-writing of the party is the only mode of making out his identity. There are, however, many other modes, as by proving that the party was present, as in *Nelson v. Whittall*. In *Page v. Mann* (b), Lord *Tenterden* admitted the evidence of the attesting witness as sufficient, without any proof of identity; but subsequently such evidence was given.—[*Bayley, B.* That was the case of an agreement for a lease, under which the defendants had had possession, so that, probably, it would contain some description at least of the

(a) 1 B. & A. 21.

(b) 1 M. & M. 79.

place, by which the defendants might be connected.] *Exch. of Pleas, 1833.*
 In *Mitchell v. Johnson* (a), Lord *Tenterden* said, that there was some evidence beyond the mere proof of the attesting witness's signature. It is true, he afterwards says, "if there were no other I should have no doubt of its sufficiency. If the objection were to prevail, it would often be impossible for the obligee of a bond to recover, where the subscribing witness was dead and the obligor a marksman." It is submitted that his Lordship laid down the rule too broadly in this *dictum*, which was not necessary for the decision of the case. In most cases there is no difficulty in giving some evidence to connect the defendant with the party who has signed the note; and it would not follow, even if it were a matter of difficulty, that it is not necessary in point of law. In *Kay v. Brookman* (b), Lord Chief Justice *Best* certainly held, that the practice was not to require further evidence of identity. [*Bayley, B.*, that was the case of a deed which constituted the defendants directors and proprietors of a mining company; I suppose that there would be a description; probably the party would be described as A. B. of such a place.]—The doctrine, as laid down by Mr. Justice *Bayley*, in *Nelson v. Whittall*, was not new. In one of the first cases on the subject, *Godfrey v. Norris* (c), the hand-writing of the obligor was proved; and it would seem more conformable to common sense to require proof in such cases of the hand-writing of the obligor than even of that of the subscribing witness. In *Wallis v. Delancey* (d), Lord *Kenyon* expressly required proof of the hand-writing of the obligor. So, in *Gough v. Cecil* (e), Lord *Loughborough* nonsuited the plaintiff at *Nisi Prius* for want of proof of the hand-writing of the obligor; and, on motion for a new trial, he

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(a) 1 M. & M. 176.

(d) 7 T.R. 266, n.

(b) *Ibid.* 287.

(e) Sel. N. P., 7th edit. 535, n.

(c) *Strange*, 34.

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said that he thought the proof of the obligor's hand-writing much the most satisfactory to the Court and jury. *Gould, J.*, thought so too; and, according to his memory, it was the practice on the Western Circuit: and though *Nares* and *Heath, JJ.*, differed, and after inquiring into the practice the Court granted a new trial, yet *Gould, J.*, expressed his dissatisfaction at the decision to the counsel for the defendant. In *Buller's Nisi Prius*(a), it is laid down that "proof that one, who called himself *B.*, executed, is not sufficient if the witness did not know it to be the defendant." On the part of the plaintiff it is only contended, that some evidence should be given of the identity of the defendant with the party who has executed the instrument; it is not contended that proof of the hand-writing of the party must be given; that is only one mode of proof. The defendant being of the same name is no proof of identity; as in the case of proving a marriage in an action for criminal conversation, some proof of the identity of the parties married with those on the register is invariably required. So also, in proving a previous conviction under the 7 & 8 Geo. 4, c. 28, s. 11, the identity of the prisoner with the person previously convicted must be proved. Identity of name, therefore, is no evidence of identity of person. [They were then stopped by the Court.]

Milner, contra.—Proof of the hand-writing of the subscribing witness is, in all cases, where the absence of the subscribing witness is accounted for, sufficient *prima facie* evidence to charge a defendant. The practice has been nearly uniform; and it is founded on the rule, that, on proof of the hand-writing of the subscribing witness in such case, every thing must be presumed to have been rightly done, and a fraud must not be imputed without some evidence of it, which should come from the other side.—

(a) 171 b.

[*Bayley, B.*—We do presume that every thing was done rightly. We presume that the note was signed by a person of the name of *Francis Musgrove*; but how does that appear to be the defendant?]*—*The plaintiff must be taken to have fixed upon the right person; he would expose himself to a prosecution for publishing a forgery, if he tried to fix a stranger with the note. If identity is to be an ingredient in the proof, it would be necessary to prove it strictly, and to shew the hand-writing of the party. —[*Bayley, B.*—There are many cases which shew that you may prove identity in other ways, by the party being present, by application for payment answered by him, or by other acknowledgments by him.]*—*It would be necessary to shew strictly the identity of the person served with process with the person who signed the note. In the older cases the word “identity” never occurs; and no such doctrine as the one now contended for is to be found in the books until the case of *Nelson v. Whittall*. In all the subsequent cases, the doubt which has been suggested has arisen from the *dictum* of Mr. Justice *Bayley* in that case. In all the old authorities and cases, the rule will be found to have been laid down without the qualification which was first brought forward in *Nelson v. Whittall*. In *Viner’s Abridgment*, the rule is laid down quite generally (a): “When there are two witnesses to a deed who are dead, if there be full evidence to prove one of their hands, and any evidence that endeavours have been used to find one to prove the other’s hand, it is sufficient; for perhaps the witness might be a stranger, and it would be a hard task to prove his hand.”—*Per Cur. Comb.* 248, *Pasch.* 6 *W. & M.* in *B. R.* in case of *Smart v. Williams* (a). If both witnesses are beyond sea, proving the hand-writing of the party is not sufficient; but in such cases it is usual to prove the hand only of one of the witnesses, and that they are beyond sea, and proving both

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(a) *Vin. Ab. tit. Evidence*, 48, pl. 3.

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their hands not necessary, *ut dicitur*. *Trin.* 5 & 6 *Geo.* 2, in case of *Smith v. Richards* (a). If a witness to a deed is dead, it is sufficient to prove his hand without the hand of the party. *Per Pratt, C. J., Trin. Vacation, 1719* (b). So, in an anonymous case (c), *per Holt, C. J., at Nisi Prius*, "In debt upon a bond upon issue of *non est factum*, if the plaintiff prove the witnesses dead, beyond sea, or that he has made strict inquiries after them and cannot hear of them, he shall be let in to prove their hands." No mention appears to have been made of any necessity of proving the identity of the defendant. It has been stated, on behalf of the defendant, that there was evidence of identity in *Godfrey v. Norris*. It is true that evidence which would establish the identity was given, but not with the object of establishing the identity, about which no question was made. The question was, whether the hand-writing of the plaintiff, who was *administrator de bonis non* of the obligee and the surviving attesting witness, could be given in evidence in an action brought by him; and letters of the obligor, mentioning the bond, were given in evidence with a view to that objection. In *Jones v. Mann* (d), where the subscribing witness had been convicted of perjury, proof of his hand-writing was admitted, and there was no mention of proving identity. In *Goss v. Tracey* (e), *Hooper*, Serjeant, mentioned a case where the surviving subscribing witness to a bond was made executor by the obligee, and, in an action by him, proof of his own hand-writing was admitted. There was no mention of identity.—[*Bayley, B.*—These cases do not say that the evidence you mention was all the evidence given. It was not necessary to say what further evidence was given; they only report that such evidence was received.]—Proof of the identity of the defendant, however, was never mentioned; and it does not appear to have

(a) *Vin. Ab. tit. Evidence*, 48, 13.

(d) *Strange*, 833.

(b) *Ibid.* 10.

(e) 1 *P. Wms.* 289.

(c) 12 *Mod.* 607.

been ever called for. So, in *Wood v. Drury* (a), no evidence of identity seems to have been required; nor in later times, in *Parker v. Hoskins* (b), *Milward v. Temple* (c), and *Wardall v. Fermor* (d): in all of which cases no mention is made of proving the identity; and there does not appear to have been any other evidence than what is mentioned in the reports. *Gough v. Cecil* is a very strong authority in favour of the present plaintiff. It is reported in *Luder's Controverted Elections*, p. 269. The writer in the text lays down the rule in this manner. "The attesting witnesses are the proper persons to give evidence concerning deeds; it is peculiar to them, inasmuch as, if they die, the inquiry is not made into the hand-writing of the parties, but that of the witnesses. This point was determined by the Judges of the *Common Pleas* in the last Term. And the reason given for it was, because the fact to be proved by an attesting witness is, that he saw the party execute; and, if he cannot be found, his hand-writing is allowed to be evidence of this fact." In a note to the above passage the case is given more at length. "The name of this case was *Gough v. Cecil*. It was an action on a bond tried at the *Common Pleas* Sittings after *Easter Term*, 1784; the subscribing witness being dead, the plaintiff's counsel called a witness to prove his hand-writing, and the Judge who tried the cause being of opinion that this was not sufficient, without proving at the same time the hand-writing of the obligor, called upon the counsel for such proof, and, upon their not being able to produce it, directed the plaintiff to be nonsuited. In *Trinity Term* it was moved to set aside this nonsuit; and the Court decided that the judge's opinion was wrong, that the plaintiff had produced the proper evidence in such a case, and accordingly set aside the nonsuit." In the note in *Selwyn's Nisi Prius*, it is stated, indeed,

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(a) 1 Ld. Raym. 734.

(b) 2 Taunt. 223.

(c) 1 Campb. 375.

(d) 2 Campb. 282.

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that *Gould, J.*, had expressed his dissatisfaction with the decision; but it is clear that the Court, after inquiring into the practice, expressly decided that no evidence beyond the mere proof of the hand-writing of the attesting witness was necessary. That, then, is an authority deciding the very point in question in favour of the present plaintiff. In *Adam and Wife v. Ker (a)*, it was held, that, where one of two attesting witnesses was dead, and the other beyond the reach of the process of the Court, it was sufficient to prove the hand-writing of the deceased witness, without proving the hand-writing of the other witness or of the obligor, the hand-writing of the attesting witness when proved being evidence of every thing on the face of the paper.—[*Bayley, B.*—Aye, of every thing which appears on the face of the paper; that is, of every thing which appears to be signed by the witness; of all which appears to have been attested by him. He appears here to have attested that one *Francis Musgrove* signed the note, not that the defendant is that *Francis Musgrove*.]—It may be collected from what fell from Lord *Ellenborough* in *Nelson v. Whittall*, that his opinion was in favour of the sufficiency of the mere proof of the hand-writing of the attesting witness. He says, that it has been the constant practice, in cases where the subscribing witness is dead, never to look at anything beyond the hand-writing of the witness. In *Cunliffe v. Sefton (b)*, where one of the attesting witnesses could not be found, though diligent search had been made, and the other had become interested since his attestation, it was held that evidence of the hand-writing of the witness who had become interested was sufficient proof. In the report of *Wallis v. Delancey*, which has been so much relied on by the other side, there is not one word to lead to the supposition that the evidence was required for the purpose of proving the

(a) 1 Bos. & Pull. 360.

(b) 2 East, 183.

identity of the party. That point never came in question; but it was not then settled, though it is now admitted on all hands, that there is no necessity to prove the hand-writing of the obligor. In *Currie v. Child* (a), the evidence of the hand-writing of the subscribing witness alone was held sufficient, and identity was never mentioned. The recent practice is admitted to have been uniformly in favour of the doctrine contended for by the plaintiff; and the three last cases on the subject which have been mentioned, *Mitchell v. Johnson*, *Page v. Mann*, and *Kay v. Brookman*, are express decisions by Lord *Tenterden* and Lord Chief Justice *Best*, upon the question distinctly raised before them, that such practice is right. In *Mitchell v. Johnson*, Lord *Tenterden* also decided that the party having signed with a mark made no difference, and that decision is an answer to the distinction attempted to be made in this respect in the present case.—[*Bayley*, B. It frequently happens that a subscribing witness says that he saw the bond executed, but that he did not know the person who executed to be the defendant. What is the consequence? It is not presumed that he was the defendant, but the plaintiff is nonsuited. According to the argument for the present plaintiff, if the party in such case were to wait until the subscribing witness died, he might recover. The rule, as I collect it, is, that the attestation when proved to be the hand-writing of a dead subscribing witness, is evidence of every thing which he asserts. Now it is not asserted by this attestation that the *defendant* executed the note. Mr. *Starkie*, in his *Law of Evidence*, lays down the rule thus (b): “For the signature of an attesting witness, when proved, is evidence of every thing upon the face of the instrument, since it is to be presumed that the witness would not have subscribed his name in attestation of that which did not take place.” In the present

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(a) 3 Campb. 283.

(b) 1 Starkie on Ev. 2nd ed. p. 328.

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case the attestation is satisfactory evidence that this note was executed by a person of the name of *Francis Musgrove*. The difficulty is, that it does not appear that the defendant is that *Francis Musgrove*.]

Cur. adv. vult.

On a subsequent day the opinions of the learned Barons were delivered as follows:—

BAYLEY, B.—There was a case of *Whitelocke v. Musgrove*, which was argued before us in the course of this term. It was an action upon a promissory note; and the only question was, whether, upon the death of the subscribing witness, or his residence abroad out of the jurisdiction of the Court being proved, evidence of the hand-writing of such subscribing witness merely is sufficient proof of the note as against the defendant? The only evidence in the cause was that of one *John Hardie*; and he stated that the subscribing witness was gone to reside in *America*; and he proved the hand-writing of the subscribing witness to the note; he knew nothing at all about the defendant, or about his circumstances or connections, or even where he lived. Now, the note was dated at *Reeth*, and purported to be signed by two persons of the name of *Musgrove*, both of whom were marksmen. The residence of the defendant was not proved; for the witness said, whether he lived at *Reeth*, or whether he had any connection there, he did not know. There was a perfect blank in the evidence as to any proof to identify the defendant with the party signing the note; and the question therefore is, whether the naked evidence of the hand-writing of the subscribing witness is sufficient to fix a defendant in such case? There are many cases in which the instrument gives some description, as by stating the residence of the party, so as to give some ground for presuming that a party proved to reside in the same place is the party who has signed the note; and in many instances you have the hand-writing of

the party, by which he may be identified as the party having signed; but here the case for the plaintiff rests on the mere proof of the hand-writing of the subscribing witness. Now, what is the effect which, with the greatest degree of latitude, can be given to the attestation of the subscribing witness? It is, that the facts which he has attested are true. Suppose an attestation of an instrument, which describes the person executing it as *A. B., of C., in the county of York.* Then the utmost effect you can give to the attestation is, to consider it as establishing that *A. B., of C., in the county of York,* executed the instrument. But you must go a step further, and shew that the defendant is *A. B., of C., in the county of York,* or in some manner establish that he is the person by whom the note appears to be executed. Now, what does the subscribing witness in this particular case attest? Why, that this instrument was duly executed by a person of the name of *Francis Musgrove.* There may be many persons of that name; and, if you do not shew that the defendant is the *Francis Musgrove* who has so executed the instrument, you fail in making out an essential part of what you are bound to prove. It is not sufficient for the subscribing witness merely to prove that he saw the instrument executed. Suppose that a subscribing witness, when called into the box, were to say merely, I saw the note executed, will that suffice? He would be asked, by whom did you see it executed? If he were to say, I saw it executed by a person who was called into the room, but I do not know whether that person was the defendant, the plaintiff would be nonsuited (a). Why? because it is an essential part of the issue, which you are bound to prove, that the instrument was executed by the defendant in the suit. It seems to me, therefore, on principle, that you must give some evidence of the identity of the defendant

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(a) See *Parkins v. Hawkshaw*, 2 Stark. Rep. 239.

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with the party who has signed the instrument. In the case from *Strange*, and the case before Lord *Kenyon*, there was, over and above the evidence of the hand-writing of the subscribing witness, evidence of the identity of the defendant, by proof of his hand-writing. I quite agree that is not necessary to prove the hand-writing of the defendant; but, if you do not prove that, you must prove something else to connect the party sued with the instrument. In *Nelson v. Whittall*, some evidence of identity was given. There are cases in which it is laid down, that it is not necessary to prove the hand-writing of the defendant; but I think that you must give some evidence of his identity. It was said by the counsel for the plaintiff, that, in cases like the present, requiring evidence of identity would impose great hardship on parties suing; but I do not see that the hardship is greater in this case than in other cases where you sue without having armed yourself with proof that the party sued is the person who has signed the instrument upon which you sue. If the instrument had shewn upon the face of it that it was executed by *F. Musgrove*, of *Reeth*, in the county of *York*, the attestation, according to the authorities, would be evidence of such being the case; but you must shew that the defendant is a person answering such description. If you intrust a witness to attest the execution by the party, and such witness die, you lose the advantage of identifying the party by his testimony; but in most cases you can either shew some acknowledgment, or prove that the party, from his residence or other circumstances, answers the description on the face of the note, or you can establish the identity of the party in some other mode. In the absence of any proof of this description, it seems to me, upon principle, that the mere proof of the hand-writing of the subscribing witness, who only says, by his attestation, that one *Francis Musgrove* executed the note, is not sufficient to enable the plaintiff to recover on this note

against the defendant. I am therefore of opinion that this rule should be discharged.

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VAUGHAN, B.—I am of the same opinion, and Lord *Lyndhurst* (a) concurs with us in the opinion which we have formed on the point in question. There must be some reasonable evidence from which, in a case where the subscribing witness is dead or incapacitated, the jury may infer that the defendant is the party who has executed the deed, or subscribed the note. Whether any evidence, beyond the proof of the hand-writing of the subscribing witness, be necessary, seems long to have been *vexata quæstio* in *Westminster Hall*. The late Lord *Tenterden* certainly appears to have acted upon the principle of its not being necessary; and Lord Chief Justice *Best* seems to have acted on the same notion. In most of the older cases, however, there appears to have been some evidence beyond the mere proof of the hand-writing of the subscribing witness. In most of them there is, as was the case in *Nelson v. Whittall*, some slight evidence of identity. It has been pressed upon us, that all which the subscribing witness purports to attest must be taken to be rightly and regularly done. Granted. Assume in this case that every thing attested by the subscribing witness was rightly and regularly done, still it does not appear to me that the plaintiff has made out that the defendant is the party who has executed according to the attestation of the subscribing witness. I was struck by the remark made by Mr. *Addison*, that it is always held necessary to prove the identity of the party in the case of marriage, and in the case of a previous conviction. I am of opinion, therefore, that some evidence of identity is necessary, in

(a) Lord *Lyndhurst* was present when the rule *nisi* was moved for, on which occasion all the authorities were brought before the Court; and

his Lordship observed, that it appeared to him that it would be very extraordinary if some evidence of identity were not necessary.

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addition to the proof of the hand-writing of the subscribing witness, and consequently that this rule must be discharged.

BOLLAND, B.—I agree with the rest of the Court, that it was necessary for the plaintiff to give some evidence to connect the defendant with the party signing the note. It is a question as to which eminent Judges have certainly entertained different opinions. It seems clear from the case of *Wallis v. Delancey*, that Lord *Kenyon* was of opinion that such evidence was necessary; and it is clear that Lord *Ellenborough* had not made up his mind upon the subject, because in *Nelson v. Whittall*, he did not take upon himself to say what would be the case if no evidence of identity had been given. The opinion of Lord *Tenterden* was certainly invariably the other way; and Lord Chief Justice *Best* acted on the same view of the subject as Lord *Tenterden*. The earlier cases cited by Mr. *Milner* do not appear to me to apply, because, in almost all these cases, the struggle was not as to the connecting the party, but whether the instrument could be read in the absence of the subscribing witness. That, however, was not the case in *Wallis v. Delancey*; and from that case it is clear, that Lord *Kenyon* required evidence to connect the defendant with the party appearing to have executed the note. I agree that such evidence is necessary, and consequently am of opinion that this rule should be discharged.

GURNEY, B.—I have often considered this subject; and I adhere to the opinion which I have formerly adopted, that, besides the proof of the hand-writing of the subscribing witness, there must be some evidence to shew the identity of the party sued with the party who has signed the instrument.

Rule discharged.

The Court afterwards, upon the application of *Milner*, ordered a nonsuit to be entered instead of a verdict for the defendant; and the plaintiff brought a new action, which was tried at the last assizes for the county of *York*, and in which he proved the identity of the defendant with the party who signed the note, and recovered a verdict.

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1833.

WAITELOCKE
v.
MUGROVE.

BURT and others, Assignees, &c., v. MOULT.

THIS was an action of trover brought by the plaintiffs, as assignees of *Dawson* and *Kerr*, bankrupts, against the defendant, to recover a bank-post bill for 200*l.*, and 10*s.* in money.

The *first* count of the declaration was upon a possession and conversion before the bankruptcy; the *second* count upon a possession before, and a conversion after the bankruptcy; and the *third* count upon the possession of the plaintiffs as assignees, and a conversion in their time. At the trial, at the *Lancaster* Summer Assizes, 1832, before *Parke, J.*, a verdict was found for the plaintiffs for 200*l.* and 10*s.*, subject to the opinion of this Court, upon a case which stated the following facts—The bankrupts, *Dawson* and *Kerr*, carried on business in partnership, at *Manchester*, as Nankeen manufacturers, for several years prior to their bankruptcy; they had a servant named *Newman*, who resided formerly in *London*, upon whom they were in the habit of drawing bills, and of afterwards remitting to him, for the purpose of providing for and paying the same. For several months previously to their bankruptcy, *Dawson* and *Kerr*, who were then in insolvent circumstances, found

One of two partners, after committing an act of bankruptcy, handed over a bank post-bill and some silver to the agent of the drawer of a bill of exchange, accepted by the partners, and which was just about to become due, for the purpose of protecting such bill. Such handing over was found to be a fraudulent preference, and to have been in contemplation of bankruptcy. On the same day, but a few hours later than the time of handing over the note and money, the other partner committed an act of bankruptcy:—Held, that the act of the partner who had committed the act the assignees of

of bankruptcy before he handed over the property was not binding, and that the two partners might recover the value of the property.

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the greatest difficulty in providing for the bills drawn by them upon *Newman*, and were obliged to borrow bills and money from their friends in *Manchester*, to enable them to do so. In *July*, 1831, many of those bills accepted by *Newman*, amounting to 1365*l.*, were returned to the indorsers in *Manchester* dishonoured; one as early as the 13th or 14th of that month; and others on the 27th, 28th, and 29th of the same month; none of which were paid or taken up by the bankrupts, excepting one bill for 70*l.*, which had been returned unpaid on the 13th or 14th. On the 1st of *August*, 1831, and on other days during that month, twelve bills drawn by *Dawson* and *Kerr* upon and accepted by *Newman*, amounting to 937*l.*, were returned dishonoured, none of which were afterwards taken up or paid by *Dawson* and *Kerr*. There were thirteen bills, amounting to 1939*l.*, due in *September*, and seventeen other bills, amounting to 1792*l.*, due in *October* in the said year, all drawn by *Dawson* and *Kerr* on and accepted by *Newman*, then running, and which they had no means or likelihood of paying, and none of which were in fact afterwards paid either by *Newman*, or *Dawson* and *Kerr*. *Kerr* committed an act of bankruptcy on the 29th of *July*, 1831; after which day no bills were paid by the bankrupts. *Dawson* committed an act of bankruptcy at 10 o'clock at night of the 1st of *August*, 1831. About two months previously to this, *Dawson* and *Kerr* accepted a bill for 200*l.*, drawn by *William Moulton*, of *Philadelphia*, brother to the defendant, and for whom the defendant was agent in this country; this bill was accepted for value, and became due and payable on the 3rd of *August*, 1831. On the morning of the 1st of *August*, 1831, *Kerr*, (one of the bankrupts), who was on terms of intimate private acquaintance with the defendant, gave to the defendant as agent for his brother in *Philadelphia*, by way of fraudulent preference of his said brother, and in contemplation of bankruptcy, a post-bill of the Bank of England for 200*l.* and 10*s.*, the joint

property of the bankrupts; and, before 2 o'clock on the same day, the defendant paid the said bank post-bill into the bank of Messrs. *Scholes, Fellow, & Co. of Manchester*, to provide for the said bill which was payable in *London*: he told the said bankers that he brought the money to take up the bill for the honour of his brother, to prevent it going back to *America*, but did not say when the same would be returned, nor did he make any mention of *Dawson* or *Kerr*. According to the nature of the transaction the bankers were not bound to apply the specific bank post-bill, received by them from the defendant, to the payment of the said bill on *Dawson* and *Kerr*; but it became the property of the bankers when delivered to them, and they thereupon entered into a contract with the defendant to pay the bill in *London* in such way as they might think fit. On the following day, the 2nd of *August*, the bankrupts being arrested at the suit of one of the creditors, the defendant became bail for them.

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The following were the points marked for argument:—
For the plaintiffs, *First*, That the conversion in this case was by the payment of the bill by *Scholes & Co.*, as agents for the defendant, and this being after acts of bankruptcy by *both* bankrupts, that the plaintiffs were entitled to recover. *Secondly*, Supposing the Court should be of opinion that the payment of the bank-notes in question to *Scholes & Co.* was a conversion, still that the defendant was liable, notwithstanding such payment took place before an act of bankruptcy by one of the bankrupts; because the appropriation of the bank-notes to the payment of the bankrupts' acceptance, being a fraudulent preference, was void; and then the transaction in law amounted to nothing more than a mere bailment, in which case the plaintiffs as assignees could maintain this action, whether the conversion were before or after the bankruptcy of the bankrupts.

For the defendant, That the action was not maintainable,

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because only one of the bankrupts had committed an act of bankruptcy at the time the post-bill and the 10s. were delivered to the defendant, and because the defendant was a mere agent to carry them to the bank at *Manchester*.

Archbold, for the plaintiffs, was stopped by the Court.

Wightman for the defendant.—The defendants are innocent parties: it was the duty of *Kerr* and *Dawson* to make provision for their acceptance; and the delivery of the bank-bill and 10s. for that purpose was good against the partner who was then solvent, and his assignees. At the time of the conversion, one only of the partners had committed an act of bankruptcy. Suppose that the other partner had never committed an act of bankruptcy, this action could not have been maintained. The act of bankruptcy by him however was subsequent to the conversion. There is nothing to show that *Dawson*, who had committed no act of bankruptcy at the time of the delivery of the bank-bill and 10s., ever dissented from the appropriation by *Kerr*; and, if *Dawson* was bound by that delivery, the assignees of *Kerr* could not sue the creditor who received the bank-bill and 10s. *Smith v. Oriel* (a).—[Lord *Lyndhurst*, C. B. The assignees who represent *Dawson* do contest it.]—It is said that the bankruptcy operated as a dissolution of the partnership, and divested the right of the bankrupt partner to dispose of the partnership assets; but suppose that, on a secret dissolution of partnership, one of the partners pays a partnership debt with partnership effects, it could hardly be contended that such payment could be considered invalid as against a creditor of the partnership innocently receiving such effects. The delivery here was good as against the solvent partner.—[Lord *Lyndhurst*, C. B.—How could it be good, when it is found in the case

(a) 1 East, 368.

to have been a fraudulent preference, and in contemplation of bankruptcy? is it not void as a fraud, and can it pass any property? Any act not *bond fide* done by a partner after committing an act of bankruptcy, is a nullity, and can pass no property. The only partner who acted in the transaction is found by the case to have acted fraudulently.]—[*Bayley*, B. If one of several partners commit an act of bankruptcy, though it will not prevent the solvent partner from disposing of partnership property *bond fide* for partnership debts, yet it is a dissolution of partnership as between the solvent and bankrupt partners, and no disposition of partnership property by the bankrupt partner can be binding. That was decided in *Thomason v. Frere* (a). In the present case *Dawson* had a right to dispose of the property, but *Kerr* had no right to dispose of any partnership property.]

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LORD LYNTHURST, C. B.—*Thomason v. Frere* governs the present case. One of two partners who has committed an act of bankruptcy hands over part of the partnership property, and that is found to have been done by way of fraudulent preference. The other partner a few hours after the transaction commits an act of bankruptcy, and his assignees contest the transaction. *Thomason v. Frere* decides that the bankrupt partner in such case cannot bind the property either of his assignees or of the solvent partner, and I think that the present case ranges itself under that decision.

BAYLEY, B.—I take the rule to be clear, that, where one of two partners commits an act of bankruptcy, he, as between himself and the other partner, has no power to dispose of the partnership property, and that every such disposition as between him and the other partner is void.

(a) 10 East, 418.

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In the common transactions of a partnership, an agency is implied from the relation between the partners; and one partner binds another as to the partnership property, by reason of such agency: but bankruptcy puts an end to such agency. The property vests in the solvent partner, and the assignees of the bankrupt partner; and here *Dawson* had a right to choose whether he would pay particular creditors or not, and no stranger (and *Kerr* was after his bankruptcy a stranger) had a right to interfere and say you shall pay a specific debt. It does not appear that *Dawson* ever concurred. If he had ratified the act of the bankrupt partner whilst it was competent for him to do so, the case would have assumed a very different aspect; but it does not appear that he knew of the transaction. It was clearly a wrongful act; and I am of opinion that the assignees of *Kerr* and *Dawson* have a right to consider the money and note as their property, and consequently that the plaintiffs are entitled to recover.

VAUGHAN, B.—I was counsel in the case of *Thomason v. Frere*, in which the Court of King's Bench held that the two partners who had committed acts of bankruptcy could not, by the indorsement of a bill of exchange belonging to the partnership, bind their own assignees or the partner who had remained solvent. I am of opinion that the present case falls within the principle of *Thomason v. Frere*, and that no property passed by the act of *Kerr* after he had committed an act of bankruptcy.

BOLLAND, B.—I agree with the rest of the Court. *Kerr* after he had committed an act of bankruptcy could not transfer the property, and it does not appear that *Dawson* assented.

Postea to the plaintiffs.

Cox v. TULLOCK.

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1833.

R. v. RICHARDS obtained a rule to set aside process which had been irregularly served in *Surrey* instead of *Middlesex*. It appeared, on cause being shewn by *Ball*, that the process had been served early in the vacation before this term, so that application might have been made before a Judge at chambers in the vacation. The Court expressed a strong opinion that the plaintiff in such case was bound to take immediate steps by going before a Judge at chambers in the vacation; but they said, that, as it was a point affecting the practice of all the Courts, they would apply to the other Judges.

A defendant had been irregularly served with process early in the vacation: —*Held*, that he could not wait until the ensuing term, but was bound to have applied in the vacation to a Judge at chambers if he wished to take advantage of the irregularity.

Cur. adv. vult.

On a subsequent day the judgment of the Court was delivered by

BAYLEY, B.—The question in this case was, whether the party ought not to have applied to a Judge at chambers in the vacation, or whether he was at liberty to wait until term. We all agree that he was bound to have applied to a Judge at chambers. I have consulted the Judges of the other Courts, and they all agree with us in the opinion I am now delivering. The short reason is, that the plaintiff has now a right in the vacation to be going on with the cause.

Rule discharged, with costs.

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1833.

WARD v. THOMAS, Executor, &c.

Where a plaintiff, who was entitled to judgment against a defendant executor *de bonis testatoris, et si non*, &c., took judgment and issued execution for debt and costs *de bonis propriis*, the Court set aside the judgment and execution on motion.

THE plaintiff in this case at the last assizes obtained a verdict against the defendant, which entitled him to judgment *de bonis testatoris, et si non*, &c., and the learned Judge before whom the case was tried having certified for immediate execution, the plaintiff signed judgment and took out execution for debt and costs *de bonis propriis*.

John Jervis obtained a rule to set aside the execution as irregular, which the Court, after hearing *Wightman* for the plaintiff, made

Absolute with costs.

ERLE v. WYNNE.

A defendant, who is arrested for a larger sum than is recovered against him, is entitled to costs under stat. 43 Geo. 3, c. 46, s. 3, if there be no reasonable or probable cause for the arrest, though the arrest is not shewn to have been malicious.

THE defendant having been arrested for a larger sum than that which was recovered against him, *John Jervis* obtained a rule for costs under 43 Geo. 3, c. 46, s. 3.

Cottingham shewed cause, and contended that the rule must be discharged, because the circumstances disclosed in the affidavits shewed clearly that the arrest had not been malicious.

BAYLEY, B.—The doctrine, that it is necessary, in support of the motion, to make out malice, has been overruled over and over again. We now decide upon the words of the Act of Parliament, and consider whether there be “reasonable or probable cause.”

Rule absolute.

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TREW v. BURTON.

THIS cause was referred to two arbitrators, *W. C.* and *F. S.*, who were to nominate an umpire before they proceeded in the arbitration. They accordingly appointed an umpire, who, on their subsequently disagreeing, made his umpirage, in the recital of which, by mistake, he stated that *W. C.* and *Thos. S.*, instead of *F. S.*, had appointed him umpire. The umpire, on the mistake being discovered, offered to republish his award. Subsequently to the publication of the award it had been altered, but not by either of the parties, by striking out the name *Thos.* and substituting *F.* in the recital. *Humphrey* had obtained a rule for an attachment for not performing the award, and *Platt* had obtained a rule to set aside the award. On both rules coming on together it was objected by *Platt* that it did not appear on the affidavits when the umpirage was made, or whether it was made within the time limited; but, upon inspection, by the Court, of the affidavit of the execution, it appeared from the *jurat* that the affidavit of execution was sworn before the expiration of the time limited for making the umpirage. [*Per Bayley, B.*—It must appear that the umpirage was made within the limited time; but in the present case that fact sufficiently appears from the *jurat*.]

Humphrey, in support of the award, was stopped by the Court.

Platt, contrà.—This award cannot be supported. The umpire professes to proceed under an authority derived from *W. C.* and *Thos. S.*, whereas, in fact, the reference was to *W. C.* and *F. S.* He appears, therefore, to be acting under a different authority from that with which he could be clothed under this reference.

An award by an umpire is not vitiated by a mistake in the recital of the award, in the Christian name of one of the original arbitrators who had appointed the umpire.

Such mistake not being material, an alteration made by a stranger subsequently to the publication of the award, by striking out the wrong and inserting the right Christian name, does not vitiate the award, but leaves it in the state in which it was before such alteration.

Where the affidavit for an attachment for not performing an award was defective, in not shewing that the award was published before the authority of the umpire expired:—*Held*, that it was sufficient if it appeared from the *jurat* that the affidavit of execution by the umpire was sworn before that time expired.

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Besides, the alteration of this instrument in a part so material as the party from whom the umpire derived his authority vitiates the award.

BAYLEY, B.—I think that the rule for the attachment ought to be made absolute, and that the rule for setting aside the award ought to be discharged. The cause was referred to two persons of the name of *W. C.* and *F. S.*, with a direction that they, before they proceeded on the arbitration, should nominate an umpire to decide in case of their not being able to agree; and it is ascertained that, in point of fact, *W. C.* and *F. S.* did, before they proceeded, duly nominate the person who has made this award as umpire. There is, therefore, a good nomination of the umpire, who is clothed with the authority which the two arbitrators were empowered to give. He does act accordingly, and makes his umpirage; but, in making it, he describes his authority, not as delegated to him by *W. C.* and by *F. S.*, but as delegated to him by *W. C.* and *Thos. S.* Now, there was no reference to *W. C.* and *Thos. S.*, and *W. C.* and *Thos. S.* never delegated any authority to the umpire, but his authority was derived from *W. C.* and *F. S.*; in framing his award, however, he describes *W. C.* and *Thos. S.* as the persons to whom the cause was originally referred, and who had appointed him as umpire, and then he proceeds and makes his award conformably with his power. The question then is, whether this mistake in the recital vitiates the award? It was not necessary to make any recital. If, instead of having the award drawn up in a formal manner, he had merely said I do make my award and umpirage, and I direct, &c. &c., there is no doubt that, without any recital, this award would have been perfectly valid; and, in declaring on such award, it is not necessary to state any recital by the umpire in his award, but it would be quite sufficient to shew that the parties referred the cause to *W. C.* and *F. S.*, with

a direction to nominate an umpire; that *W. C.* and *F. S.* accordingly nominated the umpire, and that he made his umpirage without shewing any recital in the umpirage. I, therefore, do not think that this mistake in the recital would justify the Court in setting aside the award. It has been argued that the alteration vitiates the award. Now, if such alteration had been made in any material part, I agree that it would have been fatal; but it being in a part which I think, for the reasons I have given, to be immaterial, I am of opinion that such alteration by a stranger leaves the award in the state in which it was before the alteration.

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There was a defect in the affidavit for the attachment, which does not state on what day the award was published; and, if there were nothing from which the Court could collect that it was published before the day when the power of the umpire expired, I should have thought that we could not make the rule for the attachment absolute: but it turns out from the inspection of the *jurat* that the affidavit of the execution of the award by the umpire was sworn before that day. That is an answer to this objection; and I am of opinion that the rule for the attachment should be made absolute, and the rule for setting aside the award should be discharged.

VAUGHAN, B.—I am of the same opinion. The recital is not of the essence of the award, which might have been framed so as to be perfectly good without any recital at all. If not a necessary part of the award, it may be rejected.

BOLLAND, B.—I entertained considerable doubts during the earlier part of this discussion, but I now think, on the grounds stated by my brothers who have preceded me, that we ought to support this award.

GURNEY, B.—The reference was good; it was to *W. C.*

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and *F. S.* The appointment of the umpire was good; it was by *W. C.* and *F. S.* The award was according to the power, but there was a misrecital in the Christian name of one of the original arbitrators. Now, in a declaration on the award, it would not be necessary to set out any recital by the umpire of his appointment, but it would be sufficient to aver the fact. This recital, therefore, is not a material part of the award, and consequently the mistake will not avoid it.

The rule for setting aside the award discharged; and the rule for the attachment absolute, without costs on either motion.

CANTELOW v. FREEMAN.

A prisoner on *mesne* process discharged on a condition afterwards broken may be arrested a second time without a Judge's order.

THE defendant had been arrested on *mesne* process, on the 20th of *February* last. On representing that a friend at *Cheltenham* had agreed to give his acceptance for the debt and costs, and on giving an undertaking that he would obtain such acceptance forthwith, the defendant was discharged on the 24th *February*: on the 9th of *April*, the defendant, not having obtained the acceptance agreed upon, was again arrested on a fresh *capias* without a fresh affidavit to hold to bail. A rule *nisi* having been obtained to discharge the defendant out of custody—

W. H. Watson shewed cause.—The case of *Puckford v. Maxwell* (a), and an anonymous case, 1 *Chit. Rep.* 274, n., are express authorities that, the defendant not having performed the condition on which the plaintiff agreed to his discharge, the second arrest was not vexatious. And this is not a case where a Judge's order was necessary to en-

(a) 6 T. R. 52.

able the plaintiff to arrest the defendant a second time within the rule of Court, *Hil. 2 Will. 4, r. 7*, this neither being a nonsuit, a *nonpros*, nor a discontinuance: and the reason for the distinction between a second arrest in those cases and the present is obvious; for, in each of those cases the necessity for a second arrest is owing to the *laches* of the plaintiff in misconceiving his form of action: in the present, the default is in the defendant himself.

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1833.

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FREEMAN.

Archbold, contra.—The cases cited certainly shew that the second arrest in this case was not vexatious; but the plaintiff was bound to obtain a Judge's order before he could arrest the defendant a second time for the same cause. This case is within the spirit of the rule of Court, which was to prevent defendants being harassed by second arrests. Although this is not a *nonpros*, or a nonsuit, it is substantially a discontinuance within the meaning of that rule.

BAYLEY, B.—This rule must be discharged. The defendant was discharged out of custody on the faith of his obtaining an acceptance, which was not done; and, on the faith of his representations that he could obtain that acceptance, the truth of which representations he has not now asserted. I therefore think the plaintiff was justified in arresting him a second time. The rule of Court neither extends, nor was meant to extend, to a case like the present. There has not been a discontinuance in this case; the *capias* issued on the affidavit originally filed.

The other Judges concurred.

Rule discharged, with costs.

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REID v. FURNIVAL.

A bill of exchange for 300*l.* being sent to A. to get it discounted, a banking company advanced 100*l.* on the bill upon A. giving the company his guarantee for the amount so advanced. A. had no other interest in the bill:—
Held, in an action brought by A. on the bill, that he was entitled to recover the whole amount, and not merely the amount for which he gave his guarantee.

ASSUMPSIT on a bill of exchange, dated the 24th December, 1830, drawn by one *Retemeyer* on and accepted by the defendant for 300*l.*, payable three months after date to the drawer's order. At the trial before Lord *Lyndhurst*, C. B., at the adjourned sittings in *London* after last *Hilary* Term, it appeared that the bill had been indorsed by the drawer, and also by persons named *Mackenzie* and *Macgregor*.

For the defence, a letter was put in from the plaintiff to the defendant's attorney, containing the following passages: "All I knew about the matter was, that Mr. *Furnival's* bill for 300*l.* was sent to me by a particular friend in *London*, requesting that I might get it discounted; which, as I happened to know some of the parties whose names were attached to the bill, I complied with, from a wish to accommodate my friend. It was accordingly handed over to the *British Linen Company's* bank here, by whom it was discounted at my request; but, as the whole amount of the bill was not at the time required, the sum of 100*l.* only has as yet been advanced upon it, and remitted to my friend, 200*l.* being withheld in consequence of the bill having been dishonoured.

"The only satisfactory reply which I received on the subject was, that Mr. *Furnival*, the acceptor, was a responsible person; consequently, for my own better security, I had determined in the first instance to institute legal proceedings against him, as I had no advantage directly or indirectly from the transaction, but, on the contrary, I am held answerable to the bank for the amount advanced on it on my guarantee.

"In the full hope, however, that the explanation I have now given will at once induce you or your client to reimburse me, at least in the amount already advanced on the

bill, viz. 100*l.*, and 2*l.* 1*s.* 11*d.* already incurred for expenses and interest, from 27th *June* to 4th *September* next, &c."

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Carrington, for the defendant, submitted, first, that he had no right of action, as he had not discounted the bill, but had merely carried it to the British Linen Company as the agent of others; and that even if it could be considered that, from his having given a guarantee, he had an interest in the bill, still it would only entitle him to a verdict to the amount of his guarantee. The learned Chief Baron overruled the objection, observing that the plaintiff had a right to sue on this bill by reason of his liability on the guarantee for the amount advanced; and that, as he had a right to sue, he might recover the whole amount, though he would be only a trustee for others for all above the amount of his own claim, and be bound to pay the residue to the person from whom he received the bill. A verdict having passed for the plaintiff for the whole amount and expenses—

Carrington now moved for a new trial, or that the damages might be reduced to 102*l.* 1*s.* 11*d.*; and contended that the plaintiff had no right to recover more than the amount that had been advanced on his guarantee on the bill.

Sed, per BAYLEY, B.—Somebody else may have a demand for 200*l.*; but there cannot be two actions on one note. As soon as the plaintiff recovers the whole amount, he becomes a trustee for the person entitled to the remainder of the money, after deducting the amount that he has advanced. I think there is a decision bearing on this point, to that effect, in 2 *Wilson*, 262, *Johnson v. Kennion*.

Rule refused.

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1833.

JONES v. CLIFF.

A., having goods at a pawnbroker's, delivered the duplicate to B. to take them out of pledge; B. took them out accordingly, and paid the amount due on them. On A. sending to B. for the goods, B. said he had not got them, and refused to tell who had them:—*Held*, in trover brought to recover the goods, that B. had no right to insist on a tender of the money he had advanced to get them out of pledge.

THIS was an action of trover, for a gold watch, seal, chain, and other articles, to which the defendant had pleaded the general issue. At the trial, before *Tamnton, J.*, at the last spring assizes for the county of *Salop*, it appeared that the plaintiff had pawned the articles in question with a person of the name of *Chapman*, a pawnbroker at *Manchester*, in the month of *September*, 1828; and that, in *July*, 1829, the plaintiff delivered the duplicate to the defendant to take the articles out of pawn, which the defendant accordingly did, and paid the sum of 11*l.* 17*s.* 4*d.*, being the amount for which they were pledged, together with interest; but it did not appear in evidence how or upon what terms the duplicate had been delivered by the plaintiff to the defendant. It further appeared, that, on the 9th of *November*, 1832, a demand of the articles was made on behalf of the plaintiff by a person named *Wycherley*; when the defendant said, he had not got them, but that he had had the duplicate from the plaintiff to redeem them, and admitted that the watch had been once in his possession. The defendant refused to tell who had them. The witness who made the demand told the defendant that Mr. *Jones* would allow him, *in account*, any sum he might have paid to redeem the goods. No money was tendered.

Justice, for the defendant, submitted that the plaintiff ought to be nonsuited, as there was no evidence of a conversion, and that there could be none until after tender of the amount advanced: that the plaintiff was not in a condition to ask for a return of the goods till he made a tender of the money; and that it therefore signified nothing whether the defendant had transferred the possession of the goods to another person or not. The learned Judge overruled the objection.

A letter from the plaintiff to one *James Dobell*, a person in the employ of the defendant, was then put in on behalf of the defendant, the material part of which was, that, "before we can come to a just settlement, will Mr. *Cliff* give up my watch, &c., upon receiving in full whatever he has been repaid for redeeming them." There was no evidence of the defendant's answer. The Jury, under the directions of the learned Judge, having found a verdict for the plaintiff—

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Justice now moved for a new trial, and submitted that the defendant was entitled to hold the goods, as no tender had been made of the money advanced, and that the learned Judge ought so to have directed the Jury.

LORD LYNTHURST, C. B.—As the defendant said that he had parted with the possession of the goods, and would not tell to whom he had delivered them, he had no right to insist on a formal tender. A party can only be obliged to make a tender where, by making the tender, he could obtain possession of the goods. Here, if the money had been produced, the defendant was not in a situation to have delivered up the goods.

BAYLEY, B.—Although the money was not tendered, the defendant was told he might have the money if he would deliver up the goods. But the goods were in the hands of a third person, and the defendant did not say who had them. I think that, under these circumstances, he had no right to insist on a tender being made.

VAUGHAN, B., concurred.

Rule refused.

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COOK v. ALLEN.

On a motion by a sheriff for relief under the Interpleader Act, he ought to apply promptly: and where the sheriff seized under an execution on the 14th of December, and a rule which had been obtained to set aside the judgment and execution was discharged on the 22nd of January, and the sheriff on the 31st of January obtained a rule under the Interpleader Act: it was held, on cause shewn against that rule, that he ought to have applied sooner; and that the delay was unreasonable: and the Court discharged the rule with costs.

Semble, that he ought to have applied at the commencement of *Hilary* term, notwithstanding the rule pending to set aside the judgment.

Semble, also that the sheriff should deny collusion.

THIS was a rule *nisi*, obtained under the Interpleader Act, 1 & 2 Will. 4, c. 58, s. 6, on behalf of the sheriff of *Suffolk*, for protection against the claim of a brother of the defendant to goods seized by the sheriff. The *fi. fa.* in this action was delivered to the sheriff on the 13th of *December* last, and on the following day the goods in question were seized. The present rule was obtained on the last day of *Hilary* Term, on an affidavit disclosing merely the receipt of the writ, the seizure, and the claim to the goods. It was stated and admitted, that, on the 14th *December*, an application had been made to Mr. Baron *Bolland*, at chambers, to set aside the judgment on the ground of irregularity; which he thought was a proper case for the Court. A rule was subsequently obtained to set aside that judgment, and which rule was discharged on the 22nd of *January*, in last *Hilary* Term.

John Jervis, on behalf of the claimant, contended that the sheriff's rule should be discharged on two grounds—First, that the sheriff came too late; he might and ought to have applied to the Court early in *Hilary* Term, so that the rule might have been disposed of in that term. The rule pending to set aside the judgment was an additional reason why the sheriff should have applied at the beginning of the term; at all events, after the rule was disposed of, if the sheriff had moved promptly, the cause might have been shewn in the term. Secondly, the sheriff should have denied collusion, which he has not done. By comparing the 1st and 2nd sections of the act, it appears to be the intention of the legislature that the sheriff should deny collusion.

W. H. Watson, for the plaintiff, mentioned the case of

Devereux v. John, in the *King's Bench*, *Hilary Term*, 3 *Geo. 4* (a), where Mr. Justice *James Parke* held that the sheriff was only entitled to protection when he applied to the Court within a reasonable time.

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Hughes, for the sheriff, contended that the sheriff could not apply sooner. Until the rule was disposed of he could not apply at all; for, if the judgment had been set aside, his rule would have been nugatory.—[*Bayley*, B. You do not shew any reason for the delay from the 22nd to the 31st of *January*.] The affidavit is in the form usually adopted in these cases: although it does not appear, it is obvious that it would be necessary to send to the country for affidavits, and the 31st was not an unreasonable time for that purpose. The statute does not require the sheriff to deny collusion; and in practice, since the statute passed, the sheriff in his affidavit merely states the writ, the seizure, and the claim set up by a third party.

BAYLEY, B.—I am of opinion that this rule must be discharged with costs. The intention of the statute was to protect sheriffs against the risk they run from conflicting claims made upon goods seized by them; but, in order to entitle themselves to the protection of the Court, they must apply promptly. In this case, I think that the sheriff should have made his application at the commencement of *Hilary Term*; and in the course of that term the rule would have been disposed of. It is said that a rule was pending to set aside the judgment for irregularity. I do not think this was any reason for the sheriff delaying his application to this Court: but, even if it were, he should have been ready to make his application as soon as that rule was disposed of; and if he had done

(a) 1 Dowl. P. C. 548.

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so, cause might have been shewn in that Term. I think that the delay from the 22nd to the 31st of *January* was unreasonable. No excuse is offered for this delay, which, I think, the sheriff was bound to explain.

VAUGHAN, B., and BOLLAND, B., concurred, and—

GURNEY, B., added, he did not wish it to be understood, that it was not incumbent on the sheriff in these cases to deny collusion (*a*).

Rule discharged with costs.

(*a*) It has been determined in the Common Pleas, that the sheriff must deny collusion.



GIBSON and Another, Assignees, *v.* HUMPHREY and Another, Sheriff of *Middlesex*.

In an action brought by the assignees of a bankrupt against the sheriff to recover the value of furniture and fixtures sold under an execution, the Court will not stay proceedings on payment of costs, except in cases where the defendant has restored the chattel alleged to be converted, and the plaintiff claims no special damage, or where, if the chattel is sold, there is no dispute as to the price; but the Court will not interfere if the plaintiffs do not agree as to the amount.

A fi. fa. had issued against the bankrupt, under which the sheriff, on the 14th of *January* last, had seized the furniture and fixtures in a public-house kept by the bankrupt; on the same day notice was given to the sheriff that the bankrupt had committed an act of bankruptcy, and that a *fiat* in bankruptcy would be sued out against him; on the 18th of *January*, a *fiat* issued against the bankrupt, on which he was duly declared a bankrupt, on an act of bankruptcy committed before the seizure, of which the sheriff had notice. Notwithstanding this notice, the sheriff, on the 24th of *January*, sold the furniture and fixtures; the fixtures had been removed from the premises. It appeared that the public-house had been mortgaged by the bankrupt, and after the sale the mortgagee had taken possession of the house, and sold it under a power of sale con-

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tained in her mortgage deed. The present action had been brought by the assignees of the bankrupt, to recover the value of the furniture and fixtures sold; a rule had been obtained, calling on the plaintiffs to shew cause why, on payment of the sum for which the furniture was sold, and on restoring the fixtures to the house, proceedings in this action should not be stayed. In answer, it was sworn that the sale of the house was much prejudiced by reason of the removal of the fixtures.

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W. H. Watson shewed cause.—This is an attempt to try the question of value by affidavits: it has only been in cases where there was no question as to the value of goods converted that the Court has stayed proceedings, as on the re-delivery of a chattel, such as a steam-engine, or the like; but it is a question for the jury to say what the value of the goods and fixtures were. And in this case it is shewn that the assignees are damnified, as the amount for which the mortgagee can prove on the estate of the bankrupt must depend on the amount of the sale; and how can the Court estimate this damage? The Court will not aid the sheriff in this case, considering that he sold after notice of an act of bankruptcy, and even after the *fiat* issued.

Platt, contra.—The Court will always assist the sheriff, where he appears to be acting against vexatious claims *bonâ fide*. Here the sheriff has acted fairly, and sold the goods in the ordinary way; it is impossible the plaintiffs can recover against the sheriff more than the amount of the sale: the assignees are not damnified. If there is any damage to the sale of the house, it will fall upon the mortgagee, and not upon the assignees.

Lord LYNTHURST, C. B.—We are always inclined to

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protect the sheriff where he acts fairly; but in this case, if we were to interfere, we should be assuming the province of a jury, as it is a question which the plaintiffs have a right to try if they please. The question is purely as to the amount of damages.

BAYLEY, B.—The cases have only gone to the extent that the Court will stay proceedings on payment of costs, where the defendant restores the chattel alleged to be converted, and the plaintiff claims no special damage, and where, if the chattel was sold, and no dispute as to the sum to be recovered, the Court might interfere: but they cannot interfere if the plaintiffs do not agree as to the amount. Although the defendant in this case is a sheriff, the case is precisely the same as if it had been that of any other person.

Rule discharged.

Vide Tucker v. Wright, 3 Bing. 462; *Pickering v. Truste*, 7 601; *Earle v. Holderness*, 4 Bing. T. R. 53.

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IN THE EXCHEQUER CHAMBER.

SMYTH v. LATHAM.

ERROR on a bill of exceptions. *Assumpsit* for money had and received. Plea—the general issue. At the trial before Lord *Tenterden*, C. J., at the *Middlesex* Sittings after *Michaelmas* Term, 1832, the plaintiff put in an instrument dated the 21st of *June*, 1811, under the hands and seals of three of the lords commissioners of his Majesty's treasury; by which, after reciting that by a writing, dated the 22nd of *April*, 1811, *J. Planta, E. H. Nevinson*, and *H. Jadis*, Esqrs., had been constituted and appointed to the office of paymasters of exchequer bills, at a salary of 400*l.* a year each, and that *Planta*, one of the paymasters so appointed as aforesaid, *had resigned* his said office; they, the lords commissioners nominated, constituted, authorized, and appointed the plaintiff, together with the said *E. H. Nevinson* and *H. Jadis*, to be the paymaster or paymasters of *all and every* the sums of money which should from time to time be reserved and set apart for paying off, discharging, and cancelling all exchequer bills, &c.; and the plaintiff was thereby required, jointly with the said *E. H. Nevinson* and *H. Jadis*, to obey and perform all rules, orders, and instructions, relating to the execution of the said office of paymasters, as had been or should or might from time to time be given by the commissioners, or the high trea-

A person appointed under the 44 Geo. 3, c. 1, to the office of paymaster of exchequer bills, holds his office during the pleasure of the lords commissioners of his majesty's treasury, and not during good behaviour or for life. The lords commissioners of the treasury have no authority under the above act to appoint a paymaster for life, and a general appointment, though under their seals, does not give more than an estate during pleasure. *Semble*, that the appointment by the lords commissioners of the treasury of a new paymaster in the place of a former one is in itself a determination of their pleasure, and a revocation of the appointment of the former paymaster.

Held, that it is clearly so as against a plaintiff whose right of action is founded on the appointment of the defendant to the same office, and on his receipt of the same salary. It is immaterial that the second appointment contained no express clause of revocation, and that in the first appointment the lords commissioners reserved to themselves no power of revocation.

In an action for money had and received, brought by the paymaster under the first appointment against the paymaster under the second, for fees received by him:—*Held*, that it was not necessary for the defendant to prove the fact of the resignation of the plaintiff, although it was stated on the deed of appointment of the defendant that the plaintiff had resigned.

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suror or commissioners of his Majesty's treasury for the time being for that purpose. And they thereby directed and appointed *that the yearly fee or salary of 400*l.* should be paid to each of them the said E. H. Nevinson, H. Jadis, and the plaintiff*, to be retained, kept, and received by *Nevinson and Jadis*, from the time the same was last paid to them, *and by the plaintiff from the day of the date thereof*, quarterly, out of the monies that had been imprested to the said *J. Planta, E. H. Nevinson, and H. Jadis*, or that should from time to time be imprested to *Nevinson, Jadis, and the plaintiff*, *during their continuance in the said trust*, and to be allowed on their account or accounts accordingly. And it was provided that the plaintiff should not intermeddle in the execution of the office jointly with *Nevinson and Jadis*, until he should have given such security for the due performance thereof as should be approved of by the commissioners, or the high treasurer, or the commissioners of his majesty's treasury for the time being.

The plaintiff further gave in evidence certain admissions, by which it was amongst other things admitted, that the plaintiff had given the requisite security for the due execution of the office, and that the plaintiff had (under, and by virtue of the appointment,) performed the duties of his office of one of the paymasters of exchequer bills, and received the emoluments thereof, from the 21st of *June, 1811*, up to the 11th of *June, 1824*.

The plaintiff then produced *Nevinson* as a witness, who proved that he had been appointed in *September, 1810*, in the place of a former paymaster. That the former paymaster had been removed from his office after an investigation into his official conduct, before a committee of the House of Commons. *Nevinson* produced his appointment, which, after reciting the appointment of the former paymaster in whose place *Nevinson* was thereby appointed, contained an express revocation; the words

being, "*which said writing or constitution we do hereby revoke and determine.* Nevinson proved also, that he had held his office from the 11th of *September*, 1810, until the present time; and that, during the whole of that period, there had always been three paymasters of exchequer bills, and no more; and that he had never heard of there having been at any one time, prior to the 11th of *September*, 1810, more than three paymasters of exchequer bills, nor did he believe there ever had been more than three at one and the same time. That, from *June*, 1811, to *June* 1824, the plaintiff, in conjunction with the witness and *Jadis*, had acted as the three paymasters of exchequer bills; and that the plaintiff had ceased to act on the last-mentioned day. That, on the 5th of *July*, 1824, the defendant entered upon the duties of the office of one of the three paymasters of exchequer bills so previously exercised by the plaintiff. That there was an iron chest in the office of the paymasters of exchequer bills, in which was deposited a great portion of the treasure intrusted to their charge; that there were three keys of the iron chest, one of which was uniformly held by each of the three individuals acting as paymaster; that, immediately upon the defendant entering upon the duties of a paymaster of exchequer bills, the same key which had been previously held by the plaintiff was delivered to the defendant and retained by him; that the defendant, in conjunction with himself and *Jadis*, had acted as the three paymasters of exchequer bills from the 5th of *July*, 1824, to the present time. That the defendant had, from the 5th of *July*, 1824, up to the present time, been receiving a portion of the salary and the whole of the emoluments which would have been received by the plaintiff had he (the plaintiff) continued to have exercised the duties of his office of one of the three paymasters of exchequer bills. It was then admitted by the counsel for the defendant, that, from the 5th of *July*, 1824, to the commencement of

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the action, the defendant had received 3040*l.* for salary and extra allowances upon the fundings of exchequer bills, in respect of the said office.

In answer to the plaintiff's case, the defendant put in an instrument under the hands and seals of the lords commissioners of the treasury, dated the 5th of *July*, 1824, reciting the appointment of the 21st of *June*, 1811, by which *Nevinson*, *Jadis*, and the plaintiff, were appointed paymasters of exchequer bills, and also reciting that the plaintiff, "one of the paymasters, &c. appointed as aforesaid, *had resigned*," and thereby, they, the lords commissioners of the treasury, appointed the defendant with *Nevinson* and *Jadis*, paymasters of exchequer bills, at the salary and upon the same security as were mentioned and contained in the appointment of the plaintiff.

The plaintiff, at the trial, cited the 48 *Geo.* 3, c. 48, s. 10, which gave the lords commissioners of the treasury the power of appointing paymasters of exchequer bills; and contended that his tenure in the office under the appointment was *during good behaviour*, and not *during pleasure*. That statute begins with reciting, that "Whereas it is expedient that *permanent regulations* should be established in relation to the making out, issuing, and *paying off* all exchequer bills which may hereafter be issued for any money under the authority of parliament;" and by s. 10, after reciting, "that, by reason of the multiplicity of payments which may be to be made in paying off exchequer bills, it may be difficult, if not impossible, that every payment should be made by *the several officers of the receipt of the Exchequer*," it is enacted, "That the commissioners of the treasury shall and may, from time to time, by writing under their hands, constitute and appoint such person or persons as they shall think fit, to be the paymaster or paymasters, and shall and may appoint a comptroller, and such other officers and clerks as they shall deem necessary, to pay and dis-

charge the principal sums which shall from time to time be in course of payment upon any exchequer bills, and to pay the interest due thereupon, and the premium or premiums, rate or rates, which, according to any contract or contracts made or to be made for exchanging and circulating the said bills, or any of them, shall be due or payable to such contractors, and to take in and to put upon a file or files from time to time all such bills as shall be paid off, to be cancelled as the commissioners of the treasury shall direct; and to do and perform, or cause and procure to be done and performed, such other matters and things in relation to the said bills, or the principal and interest therein to be contained, as to the said commissioners of the treasury shall seem meet, and shall be by them directed to be done and performed by such paymaster or paymasters, comptroller, or other officers and clerks for the time being; all which payments shall be made at an office to be kept in or near the receipt of the Exchequer, at *Westminster*, for that purpose; and that the commissioners of the treasury shall take or cause to be taken security from every person so constituted or appointed for his duly paying, answering, or accounting for all the monies which he shall receive, and for his true and faithful performance of his office or trust.

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And by the 11th section, it is further enacted, "That the said paymaster or paymasters shall be subject and liable to such inspection, examination, control, and audit, and to such rules in respect to paying, accounting, and other matters relating to the execution of the said office or trust of paymaster, as the commissioners of the treasury shall think fit or reasonable to establish or appoint from time to time, for the better execution of the intent and end of that act, and *the satisfaction of the proprietors of exchequer bills.*

And by section 12 it is enacted, "That, as well the person or persons so constituted or to be constituted pay-

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master or paymasters, as also the person or persons appointed or to be appointed to examine and control the receipts, payments, and acts of such paymaster or paymasters, shall severally have and receive for the service of themselves, and for the officers and clerks to be employed under them respectively, and for such charges as shall be necessarily incident to the execution of their respective offices, such salaries, rewards, and allowances, as the commissioners of the treasury for the time being shall judge to be reasonable and shall direct to be allowed to them the said paymaster or paymasters, or comptroller.

Lord *Tenterden* directed the jury—*First*, That, by the true intent, meaning, and legal construction of the several clauses of the said act, the tenure of the paymaster or paymasters of exchequer bills is in law *during pleasure*.

Secondly—That, by the legal construction of the above-mentioned writing, bearing date the 21st day of *June*, 1811, the plaintiff had an estate in his said office of paymaster of exchequer bills *only during the pleasure* of the lords commissioners of his majesty's treasury.

Thirdly—That the instrument dated the 5th day of *July*, 1824, was a legal revocation of the instrument dated the 21st day of *June*, 1811.

Fourthly—That the allegation contained in the instrument of the date of the 5th of *July*, 1824, namely, that the said plaintiff *had resigned* his said office of paymaster of exchequer bills, was a matter of no importance to the issue between the said parties.

Fifthly—That there was no fact at issue between the said parties for the consideration of the jury. And, *lastly*, directed the jury to find a verdict for the defendant.

To which direction the plaintiff tendered the following exceptions:—

First—That by the true intent, meaning, and legal construction of the several clauses of the said act, the tenure

of the office of the paymaster or paymasters of exchequer bills is in law *during good behaviour*. Exch. Chamber,
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Secondly—That, even had the said act empowered the lords commissioners of his majesty's treasury to revoke and determine *at pleasure* the appointment of paymaster of exchequer bills, no such power having been reserved in the deed-poll bearing date the 21st of *June*, 1811, the lords commissioners of his majesty's treasury had not by law the power to revoke and determine the same *at pleasure*. And he further insisted, that, there not being any limitation of the estate expressed in the deed-poll bearing date the 21st of *June*, 1811, by the delivery of such deed-poll, a freehold in the office of paymaster of exchequer bills passed to him, the plaintiff.

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Thirdly—That, admitting for the sake of argument, that, by the true intent, meaning, and legal construction of the several clauses of the said statute, the tenure of the office of the paymaster and paymasters of exchequer bills is in law *during pleasure*; and admitting further, for the sake of argument, that, by the deed-poll bearing date the 21st day of *June*, 1811, the plaintiff had an estate in his said office of paymaster of exchequer bills *only during the pleasure* of the lords commissioners of his majesty's treasury, still the lords commissioners of his majesty's treasury, who executed the deed-poll dated the 5th *July*, 1824, not having therein or thereby revoked and determined the deed-poll bearing date the said 21st day of *June*, 1811, the deed-poll bearing date the 5th of *July*, 1824, was not a legal revocation of the deed-poll bearing date the said 21st day of *June*, 1811.

Fourthly—That the lords commissioners of his majesty's treasury who executed the deed-poll bearing date the 5th of *July*, 1824, having therein and thereby founded their right to execute the same solely upon the allegation that the said plaintiff *had resigned* his aforesaid office of paymaster of exchequer bills, that allegation

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Fifthly—That the allegation made and contained in the above-named deed-poll dated the 5th of *July*, 1824, namely, that the plaintiff *had resigned* his said office of paymaster of exchequer bills, was the fact and the *only* fact at issue between the parties for the consideration of the jury.

And *sixthly*—That, as no evidence whatever had been given, at the trial of the said issue, in support of the truth of the allegation contained in the said deed-poll dated the 5th of *July*, 1824, namely, that the plaintiff *had resigned* his said office of paymaster of exchequer bills, the said Lord Chief Justice ought not to have directed the jury to find a verdict for the defendant, but ought to have directed them to find a verdict for the plaintiff.

The exceptions were argued in *Hilary* Term last, by—

The *plaintiff* in person.—By the intent of the statute of the 48 *Geo.* 3, c. 1, the tenure of the office of paymaster of exchequer bills, is, in law, during good behaviour, and not during pleasure. In the *First Institute* (a), it is said, “The rehearsal or preamble of a statute is a good mean to find out the meaning of the statute, and, as it were, a key to open the understanding thereof.” The words of the preamble in the act in question are these:—“Whereas it is expedient that *permanent* regulations should be established in relation to the making out, issuing, and *paying off* all exchequer bills which may hereafter be issued for the raising of any money under the authority of parliament.” Now, the words of this preamble import two things:—first, that there were no *permanent* regulations by law established in relation to the making out, issuing,

(a) Page 79. a.

and *paying off* exchequer bills, prior to the passing of this act; and secondly, the *permanency* of every regulation and provision made and contained in this statute.

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The 10th clause of this statute, under which the lords of the treasury are authorized to appoint the paymaster or paymasters, enacts, "That the commissioners of the treasury shall and may, from time to time, by writing under their hands, constitute and appoint such person and persons as they shall think fit to be the paymaster or paymasters." It is to be observed, that, in no part of this clause, is there any *express* power given to the lords of the treasury to *revoke or determine at pleasure*, or otherwise, any of the appointments to be made by them; nor, are there any words from which such a power can even be implied. That this is a public act cannot be denied; and that it has been passed for the *benefit of the public*, is equally undeniable; for, it is expressly so stated in no less than four parts of the act, namely, at the conclusion of the 4th, the 11th, the 18th, and the 19th clauses. It is therefore contended, that the lords of the treasury have not by the words of the 10th clause even a discretionary power in regard to appointing the paymasters, but that they are imperatively called upon to appoint; and that the only discretion which they have to exercise is in the *selection* of such persons as they shall think fit for the office. In the case of *The King v. The Commissioners of Flockwold Inclosure* (a), it is said: "the words '*shall and may*' are imperative when the clause in a statute is for the *public benefit*."

Then, as to the words "from time to time." These words were absolutely necessary, in order to enable the lords of the treasury to appoint as vacancies might happen; and can only be read as if followed by the words

(a) 2 Chitt. Rep. 251.

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“as circumstances may occur to render it necessary by death, resignation, or removal for misconduct,” and cannot be taken as words of limitation of the estate of the person to be appointed.

Then, again, the words “such person and persons as they shall think fit to be the paymaster or paymasters.” Here is the only discretionary power given to the lords of the treasury by this clause in regard to the appointments to be made; and which is simply that they shall have the selection of the persons to be appointed, who are to be such persons as they shall think *fit for the office*.

There being, therefore, in this clause no express power *to revoke or determine at pleasure*, or otherwise, nor any words of limitation, either expressed or implied, every person appointed a paymaster by virtue thereof has an estate in his office *during good behaviour*; for, Lord Chief Justice *Holt*, in *Harcourt v. Fox* (a), distinctly lays it down that an indefinite limitation in an act of parliament confers an estate for life. The same doctrine was held in the same case, both by Mr. Justice *Gregory* and by Mr. Justice *Eyre*.

If the legislature considered that by the 10th clause the paymasters held their office *during the pleasure* of the lords of the treasury, were they not, without the introduction of the 11th clause, sufficiently under their control? What greater control can any individual or any board have over a subordinate officer than to have it in his power to dismiss him *at pleasure*? The 11th clause, however, expressly declares the *degree* of authority which the commissioners of the treasury are to exercise over the paymasters; but, as the authority therein given does not extend to their dismissal *at pleasure*, no

(a) 1 Show. 531.

inference can legally be drawn that they have any such authority; for, it is a rule in the construction of *all* law, that *expressio unius*, or rather *particularis designatio est exclusio alterius*. Upon this principle, although a wife, convicted of adultery, forfeit her dower by the statute of 13 Ed. 1, c. 34, she does *not* forfeit her jointure for the commission of that crime, because it is *not* so expressed in the statute; and it is so decided in 3 *Peere Williams*, 277. And upon the same principle Mr. Justice *Bayley*, in a recent case at the *Old Bailey*, refused to grant any pension to the widow of a policeman who had been killed in apprehending a person *suspected* of felony, because the act of parliament only authorizes Judges to grant pensions to the widows of policemen killed in apprehending persons *charged* with felony.

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Again, it is a fundamental rule in the construction of all statutes, that penal statutes should be construed *strictly*, and remedial statutes *liberally*. It is so expressly laid down in *Blackstone's Commentaries* (a). That this act of parliament comes under the denomination of a remedial statute, cannot admit of a doubt.

The paymasters prior to the passing of this act were evidently considered as part of "the several officers of the receipt of the *Exchequer*" referred to in the commencement of the 10th clause; and it is presumed were appointed by the lords of the treasury for the time being *virtute officii*, which is indisputably held *during the pleasure* of the crown; and it is a clear principle of the common law, that no one can grant a greater estate in an office than he himself possesses. It is so laid down in a variety of cases, but in none more clearly and decidedly than in the case of *Sanders v. Owen* (b), where it is said, "he that has an office at will cannot make a grant for life, because

(a) 1 Bl. Com. 88.

(b) 1 Salk. 467.

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there is no original estate sufficient to bear it." Then, therefore, as the common law stood at the passing of the act, with reference to the office of paymaster of exchequer bills, the tenure of that office was clearly *during pleasure*, and the lords of the treasury as such could not grant a more enlarged estate. Then we are to consider, "what the mischief was for which the common law did not provide." Here it is necessary to look to the act in question, and see what were the objects intended to be effected by that act, and the first object will be seen to be the establishing *permanent* regulations in regard to the matters referred to in the act; and then, looking further into the act, it will be seen that the legislature have selected the paymasters of exchequer bills, and placed such paymasters at the head of the new office established by that act, for effecting the purposes contemplated thereby. Now, it is quite clear that the nature of the tenure of the office of paymaster at the passing of the act was within "the mischief" contemplated to be remedied; for, if the legislature had left the tenure of that office as it then stood, the whole objects of the act might have been defeated; for, the common law did not provide against that office being altogether abolished by the lords of the treasury, at whose *pleasure* it was then held. And it is even made more clear by the 10th clause, that the legislature saw "the mischief" of leaving the tenure of the office of paymaster as it stood at the passing of the act; for, in that clause they direct *the mode* by which the paymasters are to be constituted, which would have been altogether unnecessary, if their *previous* constitution had been such as to secure the existence of paymasters.

The very introduction into the act of a power to appoint the paymasters, is, of itself, strong evidence that the legislature were dissatisfied with the efficacy of the *previous* nature of the tenure of that office to answer the pur-

poses intended by them to be carried into effect by the act in question; or they would have left the tenure of that office as it previously stood. Lord Chief Justice *Holt*, in *Harcourt v. Fox* (a), when speaking of the act of parliament in relation to the office of clerk of the peace, says, "It is plain they (the legislature) did design and intend an alteration, and to have quite another method observed; for, otherwise, why did they make that new provision about it that they have done? If they intended it should be as it was, they would either have been silent, and left it untouched, or they would have put it in such words as would have declared such an intent. And therefore having put in these clauses, it is plain an alteration was intended, and that the clerk of the peace should be altogether according to a new model." So, in *this* case, the legislature having introduced a new mode by which the paymasters were to be constituted, must be taken to have intended that such mode should "*supersede with all its consequences* the old;" and that the office of paymaster should be altogether according to the new model prescribed by the act; for these reasons it is perfectly clear that the former tenure of the office of paymaster is within "the mischief" contemplated to be remedied by the act.

Then, thirdly, as to "the remedy," that is, what remedy parliament have provided to cure "the mischief." Here again the object of the act is to be looked to, "that of establishing *permanent* regulations in relation to the making out, issuing, and *paying off* all exchequer bills which may hereafter be issued," and it is to be considered how that object would be best effected; it could not be better effected than by giving the paymasters, under whom the purposes of the act were to be carried into effect, a *permanent* and certain tenure in their office. In the case of *Harcourt v. Fox*, before referred to, it is said, speak-

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ing of offices for life, "In this respect the wisdom and policy of the law is very great; because, when men hold their offices for life, it is an encouragement for the faithful execution of their duties. It is then also they acquire knowledge and experience in their employments, having a durable and fixed estate therein, and not being liable to be displaced *at the pleasure* of those who put them in. And the grant shall be construed most favourably to answer the intent of the law-makers, whose design is to have the office well supplied, which will be best effected when the officer has an estate for life."

If the legislature intended the estate in the office of paymaster to be *during the pleasure* of the lords of the treasury, is it at all consistent to suppose that they would have left the power in the general terms in which it stands? On the contrary, would they not have annexed thereto a power of revocation *at the pleasure* of the lords of the treasury? for, it cannot be supposed but that the legislature had well considered the legal effect of the language in which they have couched the power, and which, upon the authority of all the cases, would, it is submitted, clearly give an estate for life.

In *Hixon v. Oliver* (a), it is said, "that powers must be expressed not implied, and are construed strictly;" and in *Rex v. Lordale* (b), it was held that "where persons, as justices, commissioners, &c. having special authority by statute, they have none but what is under that statute, all other acts being void."

If the legislature had intended to have given the lords of the treasury the power of revoking these appointments at pleasure, such power would have been expressly given by the statute. By a variety of recent statutes, from the 25 *Geo. 3*, to the present time, *express* power is given to remove; shewing that, where the legislature have

(a) 13 Vesey, 114.

(b) 1 Burr. 445.

intended that there should be a power of removal at discretion, they have in all instances expressly given such power. Now, according to high legal authorities, it is lawful "to construe one part by another part of the same statute;" so it is lawful to construe one statute by another statute made for a similar purpose (that is, *in pari materia*) for, by that means, we shall be best able to discover "what answer the law-makers would probably have given to the question made, if proposed to them."

[The plaintiff here cited a variety of statutes in *pari materia*, which are mentioned in the note (a).]

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(a) 25 Geo. 3, c. 10, s. 7; 26 Geo. 3, c. 57, s. 14; 26 Geo. 3, c. 101, s. 5; 38 Geo. 3, c. 86, s. 4; 39 Geo. 3, c. 13, s. 117; 39 Geo. 3, c. 21, s. 8; 42 Geo. 3, c. 116, s. 76; 43 Geo. 3, c. 21, ss. 2 and 4; 43 Geo. 3, c. 119, ss. 1, 5, 6, and 7; 46 Geo. 3, c. 101, s. 6; 46 Geo. 3, c. 106, s. 2; 47 Geo. 3, c. 12, s. 1, 49 Geo. 3, c. 120, s. 74; 50 Geo. 3, c. 43, s. 11; 50 Geo. 3, c. 72, s. 1; 50 Geo. 3, c. 103, ss. 27—45; 51 Geo. 3, c. 15, ss. 5, 7; 51 Geo. 3, c. 35; 51 Geo. 3, c. 71, s. 2; 52 Geo. 3, c. 44, ss. 1, 4, 9; 56 Geo. 3, c. 63, s. 6; 52 Geo. 3, c. 126, s. 2; 52 Geo. 3, c. 134, s. 2; 53 Geo. 3, c. 107, ss. 1, 4; 53 Geo. 3, c. 116, s. 1; 53 Geo. 3, c. 121, s. 6; 54 Geo. 3, c. 114, ss. 3, 12; 54 Geo. 3, c. 131, ss. 1, 6; 54 Geo. 3, c. 157, ss. 2, 3, 8; 55 Geo. 3, c. 1, ss. 1, 7; 55 Geo. 3, c. 42, s. 10; 55 Geo. 3, c. 81; 55 Geo. 3, c. 107, ss. 1, 4; 55 Geo. 3, c. 138, s. 6; 55 Geo. 3, c. 190; 55 Geo. 3, c. 191, ss. 1, 2; 56 Geo. 3, c. 56; 56 Geo. 3, c. 62, s. 1; 56 Geo. 3, c. 84, s. 1; 56 Geo. 3, c. 128, s. 9; 57 Geo. 3, c. 34, ss. 6, 8; 57 Geo. 3, c. 107, s. 7; 58 Geo. 3, c. 20, ss. 2, 21, 22; 58 Geo. 3, c. 61, s. 1; 58 Geo. 3, c. 72, ss. 1, 2, 4, 23; 58 Geo. 3, c. 100, ss. 1—6; 59 Geo. 3, c. 98, s. 11; 59 Geo. 3, c. 120, s. 1; 59 Geo. 3, c. 135; 1 Geo. 4, c. 39, ss. 1—4; 1 Geo. 4, c. 49, s. 1; 1 Geo. 4, c. 69, s. 6; 1 Geo. 4, c. 112, ss. 2, 5, 25; 1 Geo. 4, c. 113; 1 & 2 Geo. 4, c. 57, s. 8; 3 Geo. 4, c. 100, s. 17; 4 Geo. 4, c. 23, ss. 1, 5; 4 Geo. 4, c. 90, ss. 4, 9; 4 Geo. 4, c. 97, s. 5; 5 Geo. 4, c. 67, s. 2; 5 Geo. 4, c. 82, ss. 1, 2; 5 Geo. 4, c. 92, s. 8; 6 Geo. 4, c. 106, ss. 2, 4, 7; 6 Geo. 4, c. 122; 7 Geo. 4, c. 62, s. 2; 7 & 8 Geo. 4, c. 53, ss. 1, 4; 7 & 8 Geo. 4, c. 55, ss. 2, 8; 7 & 8 Geo. 4, c. 59, s. 3; 7 & 8 Geo. 4, c. 65, s. 4; 9 Geo. 4, c. 41, s. 7; 10 Geo. 4, c. 44, ss. 1, 10; 10 Geo. 4, c. 50, ss. 12, 18; 11 Geo. 4 & 1 Will. 4, c. 14, s. 10; 11 Geo. 4 & 1 Will. 4, c. 27, s. 15; 1 Will. 4, c. 8, ss. 1, 2, 3; 1 & 2 Will. 4, c. 17, ss. 1, 3; 3 Geo. 4, c. 113, s. 19; 48 Geo. 3, c. 9.

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It is submitted, therefore, that the absence of any words of limitation of estate of the paymaster or paymasters of exchequer bills in this act, is conclusive evidence that the legislature intended that the tenure of that office should be *during good behaviour*, because, if such had not been the intention of the legislature, it would have been so stated in *express terms*, as was done in the numerous instances which have been referred to.

Secondly, even if the 48 Geo. 3, c. 1, had empowered the lords of the treasury to revoke and determine *at pleasure* the appointment of a paymaster of exchequer bills, no such power having been reserved in the deed-poll whereby the plaintiff was appointed, the lords of the treasury had no power to revoke the same at pleasure; and further, there not being any limitation of estate expressed in the deed-poll, by the delivery thereof, a *freehold* in the office of paymaster of exchequer bills passed to the plaintiff. In *Danver's Reports*, 45, it is said, "if a common person grants a rent or other thing that lies in grant, without limitation of any estate, by the delivery of the deed a *freehold* passes; but, if the King make such a grant of a rent, it is void for uncertainty. This is not a deed-poll executed by the King, and therefore is not to be governed by the rules of law applicable to royal grants. The 48 Geo. 3, c. 1, empowers the lords of the treasury, "*by writing under their hands*," to appoint such persons as they shall think fit to be paymasters. By this appointment they have gone beyond the words of the act, and have added *sealing*, and thus given the plaintiff a title to his office by deed-poll. The act of *sealing*, in addition to *signing*, cannot affect the validity of the instrument, or make it less "*a writing under hand*." In *Cruise's Digest* (a), it is expressly laid down that, "If a power be

(a) Vol. 4, p. 236.

given generally, without any restriction as to the nature of the instrument by which it is to be executed, or if words of a general nature only, such as *writing* or instrument be inserted, it may in such case be executed by deed." And it is laid down in the same book, that "It was formerly held that an agreement must be sealed as well as signed; otherwise it would only be considered as a parol agreement, and that the writing was only evidence of it. But this was altered, and signing, being the only thing required by the statute of frauds, was deemed sufficient." Although, therefore, by the statute in question, signing only is required, there is nothing in the statute to restrict parties from giving increased effect to the instrument by adding sealing to signing. It is therefore submitted that the execution by deed-poll of the power given to the lords of the treasury is a good execution of that power. Taking the deed, therefore, as it stands, it is perfectly clear, that not only is there no limitation of estate in the office contained in such deed, but there is also no power of revocation. And it is distinctly laid down in *Worrall v. Jacob (a)*, "That a deed executed according to a power, containing no clause for power to revoke, it cannot be revoked, though the original power contained such clause." Thus, therefore, if the act had contained an express power to revoke, there is no power reserved in the deed, and consequently the lords of the treasury cannot revoke that deed. Then, by the absence of any limitation expressed in the deed, the plaintiff has an estate in his office of paymaster of exchequer bills *during good behaviour*.

Thirdly.—If the deed-poll granted to the plaintiff the office during pleasure only, the deed-poll of the 5th of *January*, 1824, is no legal determination of such pleasure, because it contains no distinct clause of revocation; and

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(b) 3 Merivale, 256.

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the question on this point is, whether the deed appointing the defendant is a legal revocation of that appointing the plaintiff. To have had that effect, it ought either to have contained a clause in express terms revoking the plaintiff's appointment, or to have contained an allegation, which, by determining the plaintiff's interest, ought to have rendered revocation unnecessary. Here, the deed appointing the defendant does contain such an allegation, but that allegation ought to have been true in fact; and, upon a trial wherein the deed appointing the defendant was adduced in evidence as his *sole* title, the truth of that allegation ought to have been proved, and, without such proof, it must be taken to be, as it was in fact, wholly false; and that deed, therefore, cannot be considered as a legal determination of the plaintiff's interest.

Fourthly.—It was left to the jury, that it was unimportant whether the plaintiff had resigned or not. That was, however, the only matter of importance for the consideration of the jury. The deed of the 5th of *July*, being a deed-poll, must be taken most strongly against the grantor. *Browning v. Beeston* (a). A person shall always be stopped by his own deed; that is, he shall not be allowed to aver any thing in contradiction to what he has so solemnly and deliberately avowed (b). Now, if the lords of the treasury had stated that they *revoked and determined* the plaintiff's appointment, and had then gone on to appoint the defendant, the question for the learned Judge's consideration would have been, whether they had that power: but, having asserted as the foundation of their right to appoint, that the plaintiff, and not *they*, had determined the plaintiff's interest, and altogether passed over any supposed right to dismiss at pleasure, the question as to such right was no question in the cause; and

(a) Plowden, 134.

(b) Co. Lit. 352. a.

the only question was, whether the plaintiff had, by such alleged resignation, given them the right they asserted he had; and that assertion or "particular recital" (a) effectually estopped them, and consequently the defendant, from averring any other right, to justify the appointment of the defendant.

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Fifthly.—The allegation that the plaintiff had resigned, was the *only* fact for the consideration of the jury. In *Dyer*, 23, it is laid down, that, "if a man grants that to one which he hath before granted to another for the like term, the second grant will be void." Here, the grant to the defendant was of that which had before been granted to the plaintiff; the defendant's appointment so expressly states it; and unless therefore the interest under the previous grant was determined, the grant to the defendant, being of that which had been before granted to the plaintiff, was void. The proof of the allegation that the plaintiff had resigned, was essential to the defendant's title. This allegation was false in fact, and the foundation being bad, the superstructure cannot stand.

Wightman, contra.—The first question is, whether the lords of the treasury had power to revoke the plaintiff's appointment. That depends on the 48th *Geo. 3*, c. 1. By the 10th sect. it is provided, "That the commissioners of the treasury shall and may, *from time to time*, by writing under their hands, constitute and appoint such person or persons as they *shall think fit*, to be the paymaster or paymasters, and shall and may appoint a comptroller and such other officers and clerks as they *shall deem necessary*," &c.; that is, they are empowered to appoint a less or *greater* number, as occasion shall require. The lords of the treasury, holding their offices only at pleasure, could not create a freehold office. The argument on

(a) *Rees v. Lloyd*, Wightwick, 121.

THE OTHER SIDE WOULD SAY, 1. THE INCONVENIENCE, THAT IF THE PAYMASTERS WERE SO UNNECESSARY, AND WERE APPOINTED, AS THERE IS CONTINUING IN PLACE, THOUGH IT SHOULD SUBSEQUENTLY BECOME UNNECESSARY, TO HAVE MORE THAN THREE FOR THE PURPOSE OF RETAINING THE CHIEFS OF THE OFFICE. IT IS NOT THE CASE, BUT TO HAVE A INSTABILITY OF COMMISSIONERS, WHICH IS THE REAL DEFECT AND THAT, AS IT CONTEMPLATES THE REMOVAL OF THE PAYMASTERS, THE APPOINTMENT IS TO CONTINUE WITHOUT LIMITATION. BUT THE PLAINTIFF HAS NO POWER OR HOW THEY ARE TO BE REMOVED IF ANY QUESTION AS TO THE GOOD BEHAVIOUR OF THESE OFFICERS SHOULD ARISE. THE ACT OF THE TREASURY MUST NECESSARILY HAVE A LIMITATION, POWER, THE WORDS "FROM TIME TO TIME" IN THE STATUTE NECESSARILY IMPLY A POWER OF REMOVAL AND REAPPOINTMENT. IT COULD NEVER BE INTENDED THAT THESE OFFICERS WERE TO HAVE AN ESTATE FOR LIFE, AS THAT WOULD BE WHOLLY INCOMPATIBLE WITH THE SECURITY OF THE PUBLIC, THESE PAYMASTERS BEING LARGE SUMS OF THE PUBLIC MONEY PASSING THROUGH THEIR HANDS. BESIDES, BY SECT. 12, THE PAYMASTERS OR PAYMASTERS ARE TO HAVE AND RECEIVE "SUCH SALARIES, REWARDS, AND ALLOWANCES AS THE COMMISSIONERS OF THE TREASURY FOR THE TIME BEING SHALL THINK FIT." WILL THE PLAINTIFF CONTEND THAT THE LORDS OF THE TREASURY HAD NO POWER TO REDUCE THE SALARY? IF THEY HAD, WHAT WOULD BE THE USE OF HIS HAVING A LIFE ESTATE IN THE OFFICE, WHEN THE COMMISSIONERS HAD THE POWER OF TAKING AWAY THE SALARY. [Lord Lyndhurst—Do you suppose that there is anything in that clause that entitles the lords of the treasury to make a difference in the salaries of the three paymasters?] IT IS CONTENDED THAT THEY MIGHT HAVE VARIED THEM: THERE IS NOTHING IN THE ACT TO PREVENT THEM FROM ASSIGNING DIFFERENT DUTIES AND DIFFERENT SALARIES TO EACH. IF THEY HAD NOT, THERE WOULD BE THIS INCONVENIENCE, THAT THE PAYMASTERS MIGHT BE CLAIMING GREATER SALARIES THAN THE DUTIES THEY HAD TO PERFORM REQUIRED. THE LORDS OF THE TREASURY MUST HAVE INCIDENTALLY THE POWER OF REMOVAL, IF THEY HAVE THE POWER OF TAKING AWAY THE SALARY. AS TO THE AR-

gument drawn from other statutes, containing an *express* power of removal, they are there used only *ex abundanti cautela*. This is not a deed-poll, but a writing under seal, like an award. But, even if it were, these being public officers, appointed under an act of parliament, the lords of the treasury could not grant a greater estate than the act gave them power to do. If they have made a deed which creates an estate for life, when they had not the power given to them, it is void.

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The second question is, whether, by the appointment of the 5th July, 1824, the lords of the treasury have revoked the plaintiff's appointment. It appears from the evidence that there always have been three paymasters, and three only. The appointment of the 5th of July, 1824, recites the appointment of the plaintiff with two others, and the resignation of the plaintiff, and then appoints the defendant, with the other two, to be the paymasters. It is not consistent, therefore, with this deed of appointment to suppose that the lords of the treasury intended to appoint an additional paymaster; but it is clear that the defendant was appointed in the room of the plaintiff. [*Alderson, J.*—The three are appointed for the payment of "all" exchequer bills.] Wherever an office is granted to one, and another officer is afterwards appointed to the same office, it is a virtual revocation of the first. In the case of a demise to a tenant at will, a demise to a new tenant would revoke the former estate. By the appointment, also, the salaries are given to the three paymasters, which clearly shews that they were the only persons intended to be appointed.

Thirdly.—It is contended, that the recital of the false fact, that the plaintiff had resigned, is a ground for considering the grant to the defendant invalid. That is immaterial; because, if they had assigned no reason, the appointment would still have been good.

Fourthly, it is submitted, that the plaintiff had no

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right to maintain this action for money had and received. The defendant has a right to say, that, on the whole record, there could not be judgment for the plaintiff. The action for money had and received will not lie, even if the lords of the treasury had no power to revoke the plaintiff's appointment; for in that case the defendant's office cannot have been the office of the plaintiff. If there was no revocation, the plaintiff is still entitled to his salary, and the defendant has received his own salary. If the lords of the treasury had the power to revoke by placing the defendant in the plaintiff's situation, the plaintiff's office is revoked, and he is no longer entitled to his salary. In neither point of view, therefore, can this action be maintained.

The plaintiff, in reply.—It has been said, that, as the lords of the treasury hold their offices only during pleasure, they cannot grant a greater office. But the *custos rotulorum* is appointed and removeable at pleasure, and yet it has been held that the clerk of the peace appointed by him holds his office during life (a). It has been also said, that the action for money had and received will not lie. But the defendant cannot take that objection now, as the exceptions are the plaintiff's. [*Bayley, B.*—Your difficulty is, that you pray to have the judgment reversed, and to have a verdict entered for the plaintiff. In *Vines v. The Corporation of Reading* (b), it was held, that, upon a bill of exceptions, a Court of error may look to the whole evidence on both sides, to see whether the verdict for the plaintiff was sustained by the evidence.] The cases of *Howard v. Wood* (c), *Harcourt v. Fox* (d), *Martyn v. Hind* (e), and *Trelawny v. Bishop of Winchester* (f),

(a) *Harcourt v. Fox*, 1 Shower, 534.

(b) 1 Younge & J. 4.

(c) 2 Shower, 26.

(d) 1 Shower, 531.

(e) Cowp. 437

(f) Burr. 219.

all establish that this action may be maintained for taking the fees incident to an office. *Back. Chamber, 1833.*

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The judgment of the Court was now delivered by—

TINDAL, C. J.—This case comes before us from the Court of King's Bench, and the questions raised upon the record arise upon a bill of exceptions tendered by the plaintiff below, who is also the plaintiff in error, to the directions given to the jury on the trial of the cause by the late Lord Tenterden, then Chief Justice of the Court of King's Bench. The plaintiff, at the trial of the cause, took five exceptions to the direction given by the Chief Justice to the jury; of which the first was in substance this, that, by the legal construction of the several clauses of the statute 48 Geo. 3, c. 1, the tenure of the office of one of the paymasters of exchequer bills is not, as was stated by the Chief Justice to the jury, "during pleasure only," but a tenure "during good behaviour." Upon this, the first exception, and, by far the most important, as the answer to all the other exceptions appears to depend on this point, we are all of opinion, that, according to the legal construction of the statute above referred to, the tenure of the office of a paymaster of exchequer bills is a tenure during pleasure only, and not during good behaviour, or (which is the same in contemplation of law) for the life of the grantee. As the office of a paymaster of exchequer bills is not an antient common law office, of which the duration and the appointment are governed by antient usage, but is an office of modern origin, and not made the subject of legislative enactment until the statute above referred to, the question as to its duration and tenure is no other than an inquiry into the meaning and intention of the statute itself. And, looking to the object of the act, the language of the act, and the various provisions contained in it, we think the meaning and intention of the legis-

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lature was, that the appointment should be during pleasure only, and not during the life of the grantee. The *object* of the new provision appears with sufficient certainty by the preamble to the 10th section—"Whereas, by reason of the multiplicity of payments which may be to be made in paying off exchequer bills, it may be difficult, if not impossible, that every payment should be made by the several officers of the receipt of the Exchequer; therefore, and to the end the Exchequer may regularly be discharged of all the monies required by any act to be applied for paying off any exchequer bills and other charges attending the same, be it enacted, &c." The object therefore expressed by the legislature in this preamble was, to secure the due and regular payment of the exchequer bills from time to time directed to be paid off, by giving new and additional assistance to the officers of the receipt of the Exchequer whenever such assistance should be necessary. The assistance contemplated by the act was necessarily uncertain both in its extent and its duration. The issue of exchequer bills might at one time and under one state of circumstances be much larger than at another: it might be large in time of war, inconsiderable in time of peace: and consequently the regular discharge of the Exchequer of all monies applied to the payment of exchequer bills might require at one time a greater and at another a smaller number of officers. Any given number of officers, therefore, however well adapted to the exigencies of the public at the time of their appointment, might be insufficient for the dispatch of business, or might be unnecessarily large at a subsequent period. Indeed, it is within the reach of possibility, that all the exchequer bills might be paid off, and no issue of any new bills take place; in which case, the officers of the receipt of the Exchequer would stand in need of no assistance whatever. The object, therefore, of the act could not be, that any certain, definite number of paymasters and other officers should be

permanently appointed; but that there should at all times be a number adequate and sufficient, and not more than adequate and sufficient for the regular payment of the bills which might be outstanding at any particular time. The *language* of the enacting part of the section leads to the same conclusion. It is enacted that the commissioners of the treasury "shall and may" (which, for this purpose, may be taken to be compulsory on them,) "from time to time, by writing under their hands, constitute and appoint such person and persons as they shall think fit to be the paymaster or paymasters, and shall and may appoint a comptroller and such other officers and clerks as they shall deem necessary," to pay off the exchequer bills in the particular manner stated in the 10th section of the statute. The enacting words of the clause, therefore, are equally free from any restriction as to the number of paymasters or other officers. Under these words, it might perhaps be contended that they could appoint *but one comptroller*, as only one appears to be mentioned; but they might at all events appoint as few or as many *paymasters and other officers and clerks* as the exigency of the public service might require. They might begin with appointing *one* paymaster only, if they thought one paymaster and the clerks and officers under him sufficient at first; and when need required they might appoint another paymaster; and so on, from time to time, until there were as many as they thought necessary. Such is the obvious and necessary construction of the enacting words of this section.

The object, therefore, of the legislature manifestly being that of providing new officers in aid of the old officers of the receipt of the Exchequer, uncertain in number, but adequate at all times to the discharge of duties varying in their extent and demand of labour, unless the construction be adopted that the appointment shall be during pleasure only, such object cannot be com-

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pletely attained; for, if the appointment is necessarily during good behaviour, that is, for life, the commissioners of the treasury might indeed always *increase* the number when the service of the public demanded more; but they could never *reduce* the number, when, from new circumstances, it became greater than the performance of the public service required. It is therefore upon the principle that the object of the act cannot be completely carried into effect, if the commissioners of the treasury have only a power to appoint, but no power to remove, that we hold the construction of the act to be, that the power to appoint is a power to appoint during pleasure only, and not for life. Again, the power given to the commissioners of appointing paymasters is expressed in the enacting part of the 10th section in precisely the same language as that which authorizes them to appoint "such other officers and clerks as they shall deem necessary." The same words in the same sentence must receive the same construction: but it would surely be an unreasonable construction of the clause to say that *all the officers and clerks* appointed to assist the paymasters had a freehold interest in their office, and were not removable at the pleasure of the commissioners. The provisions contained in the 12th section of the act appear to us to lead to the same conclusion. By that section, the paymasters are to have and receive for their services such salaries, rewards, and allowances as the commissioners of the treasury for the time being shall judge to be reasonable and shall direct to be allowed to them. The general terms of this provision include an authority to diminish or to increase from time to time the salaries of the paymasters just as the nature of their services deserve. The commissioners, therefore, under this section, might undoubtedly reduce the salary to a nominal sum, if the duties of the office should become merely nominal. But it is surely much more consistent with the general object of the act, that they may altogether dispense with the officers

themselves when they think them no longer of use, that is, that they should have the power of removing them at pleasure, than that the officers should continue to hold their offices for life, without any real salary; and without any duty to perform: for, it would seem to be an unreasonable construction of the act, to hold, that, if ten paymasters had been appointed when ten were necessary, and, from a change of circumstances, one alone was sufficient to perform all the duties, yet that the commissioners of the treasury have no power of removing the nine, but must still retain the full number, at a tenth part of the salary to each. We therefore think that the meaning and intention of the statute was, and consequently that the necessary construction of it must be, that the office so newly created was to be determinable at pleasure, and was not an office for life.

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It is objected, however, by the plaintiff in error, that the general preamble to the act contemplates the establishment for the first time of *permanent* regulations for the making, issuing, and *paying off* exchequer bills; and it is contended that the commissioners of the treasury have consequently only a power to select proper persons, not a power to displace or remove them. But we think this consequence does not necessarily follow. It may be true that the commissioners of the treasury for the time being have under the act a permanent power of selecting paymasters and other officers, and of making regulations; but it does not follow that the office itself of paymaster should be on that account permanent during the life of the appointee. The *regulations* established under the act for the paying off exchequer bills will be just as permanent whether the commissioners have the power to appoint paymasters for life, or during pleasure only. All that the statute contemplates is, the permanency of the office, notwithstanding the change by the appointment of new sets of commissioners of the treasury; not the per-

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defendant in execution. The plaintiff's attorney, however, upon an application of the defendant, agreed to postpone charging him in execution, upon the defendant's attorney giving a written consent that the plaintiff should have until *Easter Term* to charge the defendant in execution, and that no advantage should be taken.

In the vacation before this term, the defendant took out a summons before Mr. Baron *Vaughan* for a *supersedeas*. When the case was heard before the learned Baron, it was adjourned for the purpose of affidavits being produced as to the defendant's attorney having his client's authority to give the consent. The defendant then gave notice of an application to the Court this term.

On the first day of this term, the defendant having been charged in execution, an application was subsequently made by—

Miller, for the discharge of the defendant; against which cause was shewn, in the first instance, by—

Platt, for the plaintiff.

Miller was heard in support of his rule.

Cur. adv. vult.

On a subsequent day the opinion of the Court was delivered by—

BAYLEY, B.—There was a case of *Hewitt v. Melton*, in which the question was, whether the defendant was entitled to be discharged out of custody, on the ground of his not having been charged in execution during two terms, he not having been, in point of fact, superseded, though he was supersedeable on the above ground.

By the rule of all the Courts, *Hil. 2 W. 4*, rule 85, "The plaintiff shall proceed to trial, or final judgment,

against a prisoner within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment, of which the term in or after which the trial was had shall be reckoned one."

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In this case an application was made in the course of the last vacation to my brother *Vaughan* to discharge the defendant, because he had not been charged in execution in *Hilary* Term, that being the last of the two terms. On the hearing of that application, which was subsequently adjourned for the purpose of further affidavits being produced on the subject of the treaty or agreement, on the ground of which the application was opposed, the exact language of the rule, *Hil. 26 & 27 Geo. 3*, was not adverted to. By that rule, no treaty or agreement is sufficient to prevent a *supersedeas*, unless it be in writing signed by the defendant or his attorney, or some person duly authorized by the defendant, and it be expressed therein that proceedings are stayed at the defendant's request.

It is therefore essential that there should be something in writing to shew that the proceedings are stayed at the defendant's request. In the present case, there was a written document, but it did not state that the proceedings were stayed at the request of the defendant. It was by his consent, but did not import to be at his request.

It was insisted that a notice given by the defendant, that he would not proceed on the summons, was a waiver of his right to make a further application to be discharged; but we think that that circumstance cannot be considered as a waiver. The prisoner might not be, and probably was not, aware of the language of the former rule; he might not be able to bear the further expense of attending on the summons, or he might be willing to stay in prison until the succeeding term, in order then to make an application to the full Court, so as to obtain a final decision. We think that it would be hard upon a person

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in the situation of a prisoner to hold such a notice to be a waiver. At an early period of the present, being the next ensuing term, he does apply; but, in the intermediate time, he is charged in execution on a *habeas corpus ad satisfaciendum* in this term; and it is said, that after being so charged he comes too late, because, as it is contended, the nature of the custody is changed. I take it not to be sufficient for the purpose of the exception from the general rule, that the nature of the custody should be altered by charging him in execution; but that the nature of the custody must be changed before he is supersedeable for not being so charged. It is different where the defendant has been in custody on mesne process only, and, before any attempt to charge him in execution, the nature of the custody has been changed.

The distinction taken by Mr. *Tidd* (a) is that on which the Court acts. If a party be entitled to his *supersedeas* before judgment, he may, nevertheless, be charged in execution afterwards, because, by the judgment, the custody is changed; but, if he be entitled to his *supersedeas*, after judgment he cannot be detained or charged in execution. The plaintiff's only remedy then is by suing out a new writ, in an action on the judgment. There must be that step, and he must proceed to judgment in that action before he can charge in execution.

In the case of *Wright v. Kerswill* (b), which appears to have been referred to by Mr. *Wigley* in moving for the rule in *Line v. Lowe* (c), it was determined, that the defendant, having been discharged by *supersedeas before judg-*

(a) 1 Tidd, Pr. 375, 8th ed.
"If the defendant be superseded or supersedeable for want of proceedings before judgment, the plaintiff may, nevertheless, take or charge him in execution at any time after judgment. But he cannot do so if the defendant be su-

perseded or supersedeable for want of being charged in execution, his only remedy in that case being by action of debt upon the judgment."

(b) Barnes, 376.

(c) 7 East, 330.

ment, was not finally discharged, but *after judgment* was liable to be taken in execution; though, where a defendant is superseded *after judgment* for want of being charged in execution within two terms after judgment obtained, his person cannot afterwards be taken in execution. Therefore, if the defendant, for want of being charged in execution, has been superseded, or entitled to be superseded, for there is no difference between the one and the other, the plaintiff is not at liberty afterwards to charge him in execution.

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The case of *Line v. Lowe* (a), which was under the consideration of the Court of *King's Bench*, proceeds on the ground I have mentioned. The defendant, in that case, had been in custody on mesne process, and had been superseded for want of being charged in execution within two terms after final judgment, and he was afterwards taken in execution upon a *capias ad satisfaciendum* issued upon the same judgment. A rule for his discharge having been obtained, *Rose v. Christfield* (b) was referred to, as qualifying the generality of the rule, that a prisoner once supersedeable is always supersedeable; and restricting it to cases where a prisoner remains in the same custody and under the same process. The Court took time to consider, and Lord *Ellenborough* afterwards stated that the rule was, that, if the defendant is superseded for want of proceedings before judgment, the plaintiff may, after obtaining judgment, take the defendant in execution; but otherwise, if the defendant is superseded for want of being charged in execution.

In reality, a plaintiff has the defendant in custody for two terms, and he has during that period his election whether to proceed against the goods of the defendant or to charge him in execution. If he does not so charge him within that period the defendant is entitled to his discharge

(a) 7 East, 330.

(b) 1 T. R. 591.

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under the recent rule. We come to this decision with great reluctance, because, if the defendant knew his rights, his conduct to the plaintiff has not been fair, and he has been guilty of a gross fraud; but looking at the rules and authorities, we consider ourselves bound to say that the defendant is entitled to have this rule made absolute.

Rule absolute.

SLADE v. TREW.

The venue may be changed in an action upon a written agreement to pay a sum of money on a day certain, and if not then paid to secure the same by mortgage.

THE defendant, having borrowed money from the plaintiff, gave him the following memorandum on unstamped paper:—"I have this day borrowed of ——— *Slade* 250*l.* at 5*l.* per cent. interest, and have deposited securities in his hands, and promise to pay it next *July* 1st; and, if not then paid, the said ——— *Slade* to have a right to call for a mortgage of the premises. Dated *January* 31, 1832." "Mem. that 50*l.* since borrowed is on the same terms." Upon these memoranda the plaintiff declared, and

Wightman, for the defendant, having obtained a rule *nisi* to change the venue upon the usual affidavit—

J. Jervis shewed cause, and contended that the venue could not be changed, because the action was on a written contract.

LORD LYNDHURST, C. B.—The rule is, that the venue cannot be changed in actions upon instruments under seal; but there are numerous instances in which the venue has been changed in actions upon written contracts. The venue has been changed in an action upon an I O U, and this seems to be within the same principle.

Rule absolute.

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SPECIAL *assumpsit*—The second count of the declaration stated, that, before the making of the agreement, &c. thereafter mentioned, the defendant had requested the plaintiff to advance and lend him the sum of 4000*l.* at interest, after the rate of 5*l. per cent. per annum*, upon the security of certain freehold and copyhold hereditaments and premises of him the said defendant, situate, &c.; and that thereupon, theretofore, to wit, on &c., at &c., by a certain agreement then and there made between the defendant of the one part, and the plaintiff of the other part, it was agreed between the defendant and the plaintiff as follows, viz. that the said defendant should, within one week from the date of the said agreement, make and deliver to the said plaintiff, or his solicitor, a complete abstract or abstracts of the title of the said defendant to the said freehold and copyhold hereditaments and premises, and produce to the solicitor of the said plaintiff, at some convenient place within the city of *London*, the title-deeds and evidences of title necessary to verify the said abstract or abstracts for comparison therewith, and deduce and shew a good marketable title to the fee-simple and copyhold fee thereof respectively, within one month after the delivery of such abstract or abstracts; and that the said defendant, and all necessary parties, should, on the payment of 3800*l.*, part of the said sum of 4000*l.* by the said plaintiff, execute proper conveyances, surrenders, and assurances, for conveying, surrendering,

A. agreed to advance B. a sum of 4000*l.* on mortgage of certain freehold and copyhold premises; and by the agreement it was stipulated, that, within one week from the date of the agreement, B. should deliver to A. or his solicitor a complete abstract of the title to the premises, and produce the title-deeds necessary to verify the same, and deduce and shew a good marketable title, within one month after the delivery of the abstract: and it was provided that if B. should not, within a week, deliver such abstract, and produce the title-deeds, and within a month after the delivery of the abstract, deduce a marketable title, then it was to be at A's option to consider the agreement void: and, it was further

provided, that B. should forthwith pay to A. all costs and charges incurred by him in investigating the title to the premises, &c. Abstracts of title were delivered soon after the agreement, but they were found defective. From the 24th of *September*, 1831, the day when the title ought to have been completed, until the 14th of *May*, 1832, negotiations were going on, A. remonstrating on the badness of the title, and informing B. that his money had, during the whole interval, been lying idle, and B. during this interval, endeavouring to amend his title until the last-mentioned day, when he failed to do so, and the negotiation ended. In an action brought by A. to recover the amount of costs and charges incurred by him in investigating the title, and also interest on the 4000*l.* which had been lying idle from the 24th of *September* until the 14th of *May*—*Held*, that A. was not entitled to recover the interest.

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and assuring the said last-mentioned premises unto or to the use of, or in trust for, the said plaintiff, his heirs or assigns, or to such uses as he should appoint, subject to redemption on payment of the sum of 3800*l.*, and the further sum of 200*l.*, in case the same should have been advanced, as in the said agreement mentioned, with interest, &c., on the expiration of three calendar months from the date of the said indenture of mortgage; with all usual mortgage covenants and powers of sale upon default in payment of the said mortgage money or the interest; and that the defendant should also execute a bond to the plaintiff in the penal sum of 8000*l.*, and also a warrant of attorney, authorizing any attorney of the Court of *King's Bench* to confess judgment in an action of ejectment to be brought against the defendant and his heirs for recovery of the said last-mentioned premises, or any of them; and which said bond, warrant of attorney, or judgment, were to be declared to be only for securing to the said plaintiff, his executors and administrators, the said sum of 3800*l.*, or of 4000*l.*, as the case might be, and interest, in manner aforesaid. And that it was further agreed, that the said conveyances, surrenders, and assurances, bond, warrant of attorney, and any other deeds and assurances which might be requisite or necessary to perfect the title to the said hereditaments and premises, should be prepared by the solicitor of the said plaintiff; and that the expenses incurred by the plaintiff in the investigation of the title to the said premises, and of all such conveyances, surrenders, and assurances, and of the said last-mentioned bond, warrant of attorney, and judgment, and of procuring the said plaintiff's admission to the said copyhold hereditaments, should be borne and paid by the said defendant, his executors, administrators, and assigns. And that, if the said defendant should not, within one week after the date of that agreement, deliver such abstract or abstracts of title, as aforesaid, and produce the said deeds and evidences of title in manner aforesaid, and, within one month after the delivery

of such abstract or abstracts, deduce a marketable title to the fee-simple of the freehold and the copyhold-fee of the said copyhold hereditaments, free from incumbrances, the said agreement, on the part of the plaintiff, should (if he should think proper) be utterly void, notwithstanding any rule (if such rule there was,) that time could not be made of the essence of a contract, or any other rule or maxim whatsoever. *And that the said defendant, his executors or administrators, should forthwith pay to the said plaintiff all costs and charges incurred by him or them in investigating the title to the said premises, and of any deeds or other instruments which might have been prepared in consequence of the said agreement, if the same should have been prepared at the desire of the said defendant or his solicitor. And the plaintiff agreed, that, if the defendant should, within the respective times, deliver such abstract or abstracts, and produce such deeds and evidences as aforesaid, and deduce a clear and marketable title to the fee-simple and copyhold-fee of the said hereditaments and premises respectively in manner aforesaid, he, the said plaintiff, should and would, on the execution of such conveyances and assurances as aforesaid, lend and advance to the said defendant the said sum of 3800*l.* on the security last aforesaid; and that he should and would advance and lend to the said defendant, on the security last aforesaid, the further sum of 200*l.* when the said defendant should have disbursed 200*l.* in rebuilding the farm-house on the said hereditaments at &c., and produce a certificate from the builder employed, that the said sum of 200*l.* had been expended in and upon the rebuilding of the said farm-house, verified by affidavit sworn before one of his Majesty's Justices of the Peace, or a Master in ordinary, or a Master extraordinary of the High Court of *Chancery*. And it was lastly agreed, that all the costs and expenses of or incident to the said agreement should be borne or paid by the said defendant, his executors or administrators. The declaration then set out mutual promises, and stated,*

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that, although the plaintiff, always from the time of making the agreement, had been ready and willing to perform and fulfil the same in all things on his part and behalf to be performed, and to lend and advance the said several sums of 3800*l.* and 200*l.*, according to the conditions and stipulations of the agreement, to wit, at &c., whereof the defendant, on &c., at &c., had notice, and was then and there requested by the said plaintiff to deliver to one *Henry Rivington Hill*, the solicitor of him the said plaintiff, a complete abstract or complete abstracts of the title of the defendant to the said hereditaments and premises; and, although the space of one week since the date of the said agreement had long since elapsed, to wit, at &c., yet, the defendant did not, nor would, within the space of one week from the date of the agreement, or at any time before or since, make and deliver to the said plaintiff or his said solicitor, a complete abstract, or complete abstracts, of the title of him the defendant to the freehold and copyhold hereditaments and premises, but had hitherto wholly neglected and refused so to do, to wit, at &c., contrary, &c. By reason whereof the plaintiff had been deprived of all the benefit and advantages which he would have derived from the completion of the mortgage, and had been put to great expenses, amounting in the whole to a large sum of money, to wit, 50*l.*, in endeavouring to procure the said abstract or abstracts, and to get the mortgage completed; *and had also lost all gains and profits which he would have otherwise gained and acquired by employing and using divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of 4000*l.* provided and kept by him the said plaintiff for the completion of the mortgage.* And that, although the costs and expenses of or incident to the agreement amounted to a large sum of money, to wit, 50*l.*, of which the defendant had notice, and was requested to pay the same according to the tenor of the agreement, and of the promise of the defendant; yet, the defendant did not, nor would, when so request-

ed, as aforesaid, or at any other time before or since, pay the same to the plaintiff, but had hitherto wholly refused so to do, contrary to the agreement.

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The third count was similar to the second in all respects except the breach, which was the not making a good title within a month from the time of delivering the abstracts.

At the trial, before *Bayley, B.*, at the *London* Sittings after last *Michaelmas* Term, it was proved, that, soon after the agreement was made, abstracts of title were delivered to the plaintiff; that they were in many respects defective; that, from the 24th *September*, 1831, the day when the title ought to have been completed, until the 14th *May*, 1832, continual negotiations were going on, the plaintiff remonstrating on the badness of the title, and informing the defendant that his money had, during the whole interval, been lying idle, and the defendant during this interval endeavouring by degrees to amend his title until the last-mentioned day, when he insisted that his title was complete, and refused to take further steps to deduce it.

Upon its being shewn that the abstracts were incomplete, and that no title whatever was made as to thirty acres, part of the lands comprised in the agreement, the plaintiffs contended, that, in addition to the expenses of the agreement, and of investigating the title, they were entitled to recover interest at the rate of *5l. per cent.* upon the mortgage money, 4000*l.*, which had been lying idle from *September* 24th, the day when the title ought to have been completed, until *May* 14th, when the agreement was at an end.

This, on the part of the defendant, was objected to on two grounds: *First*.—It was contended that its being provided by the agreement, that, if the defendant failed to make out a good title within one month, the plaintiff should be repaid the expenses of investigating it, excluded a claim for the interest, upon the principle *expressum facit cessare tacitum*.

Secondly.—Even supposing, when the parties went on

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after the period of a month mentioned in the agreement, that the plaintiff might, under the circumstances, be entitled to interest, there was no count upon which it could be recovered. That there ought to have been a count upon an agreement to make a title generally without reference to time. That this was the contract between the parties when they were proceeding after the expiration of the time mentioned in the agreement.

Under the direction of the learned Baron, a verdict was taken for the plaintiff for 175*l.* 15*s.* 8*d.*, with leave to move to reduce it by 104*l.*, the amount claimed for interest.

In *Hilary* Term, *Butt* obtained a rule *nisi* to reduce the verdict accordingly, against which cause was now shewn by—

Cleasby.—The general right of a vendee or mortgagee to recover interest upon money kept lying idle in his hands for the purpose of completing a purchase or mortgage, is not disputed by the present defendant; but, the question is, whether the terms of the agreement or the state of the pleadings in this instance preclude the plaintiff from recovering it.

First.—As to the agreement itself, there is nothing in it to exclude the claim for interest. It is true, in case the defendant omits to deliver abstracts and make a good title, as stipulated, he is to repay the plaintiff the costs and charges incurred by him. But this does not exonerate him from paying any other damages sustained by the plaintiff through his breach of the agreement. The maxim *expressum facit cessare tacitum* does not apply here, because interest is not sought to be recovered upon an implied contract, but as part of the damages resulting from the breach of an express contract. It is analogous to the case of an agreement between parties with a stipulated penalty for non-performance. In that case, a party may recover damages beyond the stipulated penalty, provided they arise by reason of the breach of the agreement by the other party.

Harrison v. Wright (a). But, in point of fact, that part of the agreement which is relied on as limiting the liability of the defendant, does not apply to the case as it now stands. The effect of the clause is, that, if the defendant did not deliver his abstracts or make out his title within the time specified, then the agreement on the part of the plaintiff should be utterly void (if he should think proper), and the defendant should forthwith repay him his costs and expenses. It is obvious that the repayment of these costs and expenses is stipulated for in case the contract is off at the particular time mentioned; any limitation, therefore, derived from the mention of these costs and charges must be confined to the same case. But the claim for interest arises wholly from the contract having been continued *beyond* those times. It is to be observed, that the omission of all mention of interest is not entitled to any weight; had the contract ceased at the times mentioned, no claim for interest could have arisen. At the expiration of these times, the same contract continued in force between the parties, altered only so as to be adapted to their new position. The clause relied on, on the other side, is not adapted to their new position, and therefore their rights and liabilities are not to be construed by any reference to that clause.

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As to the second objection, if the plaintiff has a claim for interest, he can recover it upon the second count of the declaration. There is an averment in that count, that the plaintiff was at *all times*, from the making of the agreement, ready to perform it on his part, and advance the money, whereof the defendant had notice; and the breach assigned is that the defendant did not, within the space of one week from the time of making the agreement, or at any time, deliver the complete abstracts of title. Now supposing this contract to be for the delivery of complete

(v) 13 East, 343.

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abstracts within a week, and the parties go on afterwards, and the plaintiff sustain loss thereby, there is no rule to prevent his recovering this loss upon such a contract and such a breach. It is clear, that, in point of fact, the loss is a consequence of the breach of this contract. Had it been a necessary consequence there would have been no question. It is a consequence to which the defendant was a party, and which arose for his benefit. The amount of consequential damage is not always calculated by strict reference to the record. For instance, interest has been held recoverable upon an *indebitatus* count for goods sold and delivered, where it was *proved* that the real contract was for a bill of exchange, upon which interest would have run. *Marshall and Another v. Poole* (a). The waiver of the time was merely an agreement to accept, as a performance of the original contract, a subsequent delivery of the abstracts. No independent new contract arose; it was a continuation of the old one. *Warren v. Stagg*, cited in *Little v. Holland* (b), *Cuff v. Penn* (c). If that be so, it is clear that the consequences of the continued contract must be, in legal contemplation, consequences of the original one.

But the agreement set out in the second count is not, strictly speaking, an agreement to deliver abstracts in a week. It is a rule of construction that the whole of an instrument must be taken together. In the early part of this agreement the defendant undertakes to deliver complete abstracts in a week; but the subsequent clause declaring, that, in case complete abstracts shall not be delivered within a week, the agreement shall, *on the part of the plaintiff*, be void, *if he shall think proper*, shews the real construction of the instrument to be the same as an undertaking to deliver abstracts generally, with an option

(a) 13 East, 98.

(b) 3 Term Rep. 591.

(c) 1 M. & Sel. 21.

reserved to the plaintiff to declare *off* at the end of a week in case they are not delivered. The averment in the second count, of his readiness to perform the contract on his part, shews that he did not exercise this option; and therefore his rights under this agreement, coupled with the above averment, are precisely the same as upon agreements of a similar nature which do not specify any time. If, therefore, the facts of the case give the plaintiff a claim for interest, it can be recovered upon this count.

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Butt, contrà.—When the time for the performance of the original contract has expired, and the parties by their conduct agree to a longer time, all the terms applicable to the original agreement are engrafted upon the new agreement, as far as they are compatible therewith. In *Harrison v. Wright*, it was held, that the party was not confined to the amount of the penalty, but might recover damages beyond that amount, for the general breach of the agreement. That, however, is quite inapplicable to the present case, which rather resembles the cases of liquidated damages, where the party is confined to the amount of damages by which he has agreed to be bound. Here the plaintiff was under no necessity of providing his money before the abstracts were furnished and the title made out. The agreement did not require him to do so.

The parties having expressed what damages and charges the defendant was to pay, in case he did not perform his agreement within the time, no additional damages can be recovered. Where the parties have stipulated to pay particular damages, it is surely not competent to the plaintiff to say that the law would have allowed him more if there had been no such stipulation. Suppose that more than the law would allow had been stipulated for, as in the case of an agreement not only to pay for the charges of inves-

(a) 15 East, 223.

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tigating the title and to pay interest, but also to indemnify against loss by selling out of the funds, it would be no answer to say, that the law would only have allowed damages for the two first. There is no reason why the agreement should be departed from in one case more than in the other. Supposing then, that, in the present case, less is given than the law would have given to the plaintiff, the defendant has a right to say that the matter is provided for by the express stipulation of the bargain.

In *Grimman v. Legge* (a), *Bayley, J.*, said, "where there is an express contract between the parties, none can be implied. The plaintiff therefore, having destroyed his right to recover the rent according to the contract, has destroyed it altogether." And that learned Judge then cited *Cook v. Jennings* (b), in which it was held, that, "where a party by agreement engaged to pay freight on arrival at a specified port, and the ship never arrived at that port, but landed her cargo at an intermediate point, and it was accepted by the freighter, the plaintiff was not entitled to recover a proportionable part of the freight for such part of the voyage as the ship performed, because, where there is an express contract, the law will not imply one."

It has been said on the other side, that there is only one contract in this case; but, in reality, the present case resembles the case of a tenant holding over after the expiration of the tenancy specified in an agreement or lease, who continues to hold on the terms of the original agreement or lease as far as they are compatible with the nature of such new holding. Here, if all the terms of the original agreement, applicable to the new bargain, which related to the extension of the time, were held to be imported into the new agreement, there would be in such new agreement the stipulation as to the damages to be recovered, which are for costs and charges only; and, under

(a) 8 B. & C. 324.

(b) 7 T. R. 381.

such new agreement, general damages cannot be recovered; and, if they could be recovered by law, they cannot be recovered without committing a fraud on such new agreement.

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Cur. adv. vult.

The judgment of the Court was now delivered by—

BAYLEY, B.—This was an action on two agreements, and there was a verdict for the plaintiff, damages, 17*l.* 15*s.* 8*d.* Upon the first agreement no question arose. Upon the second agreement, which was set out in the *second* count, leave was reserved to move to reduce the verdict by 104*l.*, an amount claimed for interest. The parties stood in the situation of intended mortgagor and intended mortgagee. The important stipulation in the second agreement applicable to this case was, that, “within one week from the date of the agreement, the defendant should make and deliver to the plaintiff, or his solicitor, a complete abstract or abstracts of the title of the defendant to the said freehold and copyhold hereditaments and premises, and produce to the solicitor of the plaintiff, at some convenient place in the city of London, the title-deeds necessary to verify the said abstract or abstracts for comparison therewith, and deduce and shew a good marketable title to the fee-simple and copyhold-fee thereof respectively, within one month after the delivery of such abstract or abstracts.” And then there was this stipulation, that, if the defendant should not within a week deliver such abstract, and produce the title-deeds, and, within a month after the delivery of the abstract, deduce a marketable title, then an option is given to the plaintiff to consider the agreement void, notwithstanding any rule that time could not be made the essence of a contract. Then follows a provision with respect to damages: “that the defendant shall forthwith pay to the plaintiff all costs and

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charges incurred by him in investigating the title to the premises, and of any deed or other instrument which may have been prepared in consequence of the said agreement, if the same shall have been prepared at the desire of the defendant or his solicitor." When parties are about to enter into an agreement for a subsequent mortgage, they are at liberty to prescribe such terms, with a view to events, as they shall think fit; they may extend or limit the particular instances and extent to which damages shall be given; and I think that the words "all costs and charges incurred by him in investigating the title," mean only what are incurred in so doing, and that it is impossible to say that those words are sufficiently extensive to cover the interest of money lying by during the time the parties were in treaty. In what situation was the plaintiff? His money was lying at his bankers, and he might have made a bargain, that, unless the agreement was carried into effect, then the loss of interest should be paid and borne by the other party. He might have made a bargain of that description; but if an express bargain is made, and the language is such that it is not sufficiently comprehensive to include the interest, he is not entitled to recover that interest in the event of the mortgagor choosing to rescind the contract. Let us see whether the language is sufficiently large to cover interest. It is, "to pay to the said plaintiff all costs and charges incurred by him in investigating the title;" it is totally silent as to interest on the mortgage money lying by during the interval; therefore, it seems to me, if that had been the state of things ultimately, it is impossible to come to the conclusion that interest was payable.

The parties continued in treaty for four or five months. Does that make any substantial difference? It seems to us, and we have talked with the other Judges, that it does not make any substantial difference. The plaintiff was at liberty to have made a stipulation that interest

should be paid; he does not, but he goes on with the contract on the same terms. It was perfectly competent to the plaintiff to have said, "I will go on with the contract if you will agree to pay interest on the money which is lying idle." Nothing whatever is said; and as nothing was said, it seems to us that it was left to the original contract, that is, to pay all costs and charges incurred in investigating the title. That is the extent to which the defendant is liable by the specific contract. Therefore, we are of opinion, that interest was improperly allowed, and that the present rule for striking that out of the damages assessed ought to be made absolute.

Rule absolute.

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LUCAS v. JENNER, Executrix.

ASSUMPSIT.—Pleas, the general issue and *plene administravit*. Justice obtained a rule for judgment as in case of a nonsuit.

Mansel, who shewed cause, said he was willing to give a peremptory undertaking to try the issue joined upon the first plea, but applied to be at liberty to withdraw his replication to the second plea, and take judgment of *assets quando*, &c.

Justice objected to this, but,

BAYLEY, B., thought the proposition reasonable; and the rule was discharged upon a peremptory undertaking to try the first issue, the defendant being at liberty to take out a summons to withdraw his replication to the second plea, and take judgment of *assets quando*.

Rule accordingly.

An executrix pleaded the general issue, and *plene administravit*, and afterwards moved for judgment as in case of a nonsuit. The Court discharged that rule upon a peremptory undertaking to try the first issue, and allowed the plaintiff to withdraw his replication to the second plea, and take judgment of *assets quando*, &c.

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A testator devised his real estates to *A.* for life, and, after his decease, devised all his estate, as well real as personal, and all accumulations thereof, "to such of his the said testator's relations of the name of *Pearce*, being a male," as *A.* should by deed or will give, devise or bequeath, or nominate or appoint; and, in default of such appointment, the testator devised the said estates and premises "to such of his the testator's relations of the name of *Pearce*, being a male, as *A.* should approve of or adopt," "if he should be living at the death of *A.*, his heirs, executors, administrators, and assigns, forever." And, in case *A.* should not have

adopted any such male relation, or in case he should have made such adoption and there should not be any such male relation living at the time of the decease of *A.*, then the testator devised the said estates and premises "unto the next and nearest of kin of him the said testator, of the name of *Pearce*, being a male, or the elder of such male relations, in case there should be more than one of equal degree living at his the said testator's decease, his heirs, executors, administrators, or assigns, for ever." The testator then gave all his plate, books, pictures, household goods, &c. to his executors, "in trust to permit and suffer *A.* to have, use, and enjoy the same during his life, and, after his decease, then in trust for the persons who should succeed to or inherit his the said testator's real estates under and by virtue of that his will." *A.*, the tenant for life, died without issue, without having executed the power of adoption of a relation of the testator's, according to the will. The next or nearest relation, or nearest of kin, of the testator, living at his decease, were—first, *A.*, the tenant for life—secondly, *B.*, the plaintiff—and, thirdly, *C.*, the plaintiff's brother. The testator had a brother, of the name of *Zachary*, who, if living, or his son, if he had died leaving issue male, would have been the testator's next and nearest relation, and nearest of kin, of the name of *Pearce*; but it appeared that he had gone to sea, and had not been heard of for many years:—*Held*, that, under these circumstances, if *Zachary*, the testator's brother, died without issue, in the lifetime of the testator, *A.* took under the ultimate limitation, contained in the testator's will, an estate in fee simple in the testator's real estates, and an absolute interest in his personality.

BY order of his Honor the Master of the Rolls, the following case was sent for the opinion of this Court. *Richard Pearce*, being, at the date of his will, hereafter stated, and at the time of his decease, seised in fee of certain freehold and copyhold estates in the counties of *Hertford* and *Leicester*, and at *Westminster* and *Rushden*, in the county of *Northampton*, by will, bearing date the 30th day of *March*, 1813, duly executed and attested, after devising certain estates to be sold for the payment of certain debts and legacies, and bequeathing an annuity to be paid out of his freehold and copyhold estates not thereinbefore devised, gave, devised, and bequeathed his manors of *Flamstead* and *St. Agnells*, in the county of *Hertford*, and manor of *Stanwick*, in the county of *Northampton*, with the appurtenances, and also all and every his lands, real estates, and hereditaments, both freehold and copyhold, situate and being in the several counties of *Hertford*, *Leicester*, and *Northampton* (except the estates before devised to be sold, and the advowson of the church or rectory of *Husbands Bosworth*, and the presentation thereto), or elsewhere the same might be situated, unto his said cousin, *Thomas Pearce*, and his assigns, for and during the term of his life; and the said

testator gave, devised, and bequeathed all his said manors, and his advowson of the parish church or rectory of *Husbands Bosworth* aforesaid, with its appurtenances, and all his lands and hereditaments situate in the counties of *Hertford, Leicester, Northampton*, and elsewhere, with their appurtenances, and all his stocks, funds, and securities for money, and all and singular other his real and personal estate (save and except as thereafter, or by any codicil to be added to his said will, was specifically bequeathed or mentioned), and also all his, the said testator's, copyhold lands and hereditaments, situate in the said several counties, or wheresoever else the same might be situate, except the estates before devised to be sold, subject nevertheless to the life estate thereinbefore given to his said cousin, *Thomas Pearce*, of and in the said manors and manorial rights, lands, hereditaments, freehold and copyhold estates, and to the payment of the annuity therein mentioned, to the uses, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisoes, conditions, declarations, and agreements thereafter mentioned, expressed, and declared, and thereafter stated; *and, in case such person as thereafter was mentioned, as his the said testator's said cousin, Thomas Pearce, should approve of or adopt, should be under the age of twenty-one years at the decease of his said cousin Thomas Pearce*, the said testator gave an annual sum of 200*l.*, to be applied for and towards the maintenance and education of *any person being a male relation of him the said testator, of the name of Pearce, whom the said Thomas Pearce should approve of and adopt*, and should signify the same in writing, under his hand, which he the said testator did thereby authorize and direct him the said *Thomas Pearce* to do, as soon after his the said testator's decease as he could conveniently, *from the time of his said cousin Thomas Pearce's decease*, until such person should have attained the age of twenty-one years;

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and from and after the decease of his the said testator's said cousin Thomas Pearce, the said testator demised all and singular the said premises, as well his real estate as personal, as all accumulations thereof, to such of his the said testator's relations of the name of Pearce, being a male, as his cousin, the said Thomas Pearce, should, by any deed or writing, signed by him in the presence of two subscribing witnesses, or by his last will and testament in writing, by him to be executed in the presence of three or more credible witnesses, give, devise, or bequeath, or nominate or appoint the same to; and, in default of any such gift, devise, bequest, or nomination or appointment, by his the said testator's said cousin Thomas Pearce, to or in favour of any such male relation of him the said testator, of the name of Pearce, as aforesaid, then the said testator devised the said estates and premises to such of his the said testator's relations of the name of Pearce, being a male, as the said Thomas Pearce should approve of or adopt, for the purposes of education as aforesaid, if he should be living at the time of the decease of his the said testator's said cousin Thomas Pearce, and his heirs, executors, administrators, and assigns for ever; and, in case his the said testator's cousin Thomas Pearce should not have approved of or adopted any such male relation of him the said testator as aforesaid, or in case he should have made such approval or adoption of any such male relation of his (the said testator's), and there should not be any such male relation living at the time of the decease of his said cousin Thomas Pearce, then the said testator devised the said estates and premises unto the next and nearest relation or nearest of kin of him the said testator of the name of Pearce, being a male, or the elder of such male relations, in case there should be more than one of equal degree who should be living at his the said testator's decease, his heirs, executors, administrators, or assigns for ever, (being the clause to which the questions referred). And as

to the said testator's advowson or rectory of *Husbands Bosworth* aforesaid, the said testator gave the first and next presentation to the same rectory, which should happen upon his decease, unto certain persons therein mentioned in succession; and, in case none of them should choose to present themselves, or declare their intention of so doing by the time allowed them, as therein mentioned, or should refuse the same, such refusal to be declared as therein mentioned, then the said testator directed that the presentation to his said rectory or living of *Husbands Bosworth* should at all times go and belong to his said cousin *Thomas Pearce*, (whenever the said rectory should become vacant), to present to *at all times during the life of him the said Thomas Pearce*. And the said testator gave all his plate, books and pictures, household goods, beds, bedding, linen, and household furniture, at *Husbands Bosworth* and *Stanwick*, in the said will mentioned, or elsewhere, to his executors, in trust to permit and suffer his said cousin *Thomas Pearce*, to have, use, and enjoy the same during his life; *and, after his decease, then in trust for the persons who should succeed to or inherit his the said testator's real estates, under and by virtue of that his will*; and the said testator declared his mind and will to be, and he did thereby order and direct his said cousin *Thomas Pearce* to pay and apply so much of the rents and profits of his said estates so given, devised, and bequeathed by him the said testator to him for his life as aforesaid, not exceeding the annual sum of 200*l.*, as he in his judgment and discretion should think proper, for and towards the maintenance and education of such person, being a male relation of him the said testator, of the name of *Pearce*, whom his said cousin should approve of and adopt, in manner aforesaid, in case such male relation should, at the time of his adoption by his the said testator's said cousin, be a minor under age, until such person should have attained his age of twenty-one years,

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and lay out and invest the residue of the said annual sum of 200*l.* (not expended in such maintenance and education) at interest, to accumulate, in the name of his the said testator's said cousin *Thomas Pearce*, in some of the public funds, or upon government or real securities, during the minority of such male relation of the name of *Pearce*; and the said testator declared and directed, that his said cousin *Thomas Pearce*, his executors and administrators, should stand seised of such accumulations, in trust for the benefit of such male relations of the name of *Pearce*, and the same, with the dividends and interest, should be assigned to him at such times, and in such proportions, after he should have attained his age of twenty-one years, as his the said testator's said cousin *Thomas Pearce*, his executors or administrators, should think most to his advantage; and, in case of his death before attaining twenty-one years of age, then *in trust for the benefit of such male relation of the said testator of the name of Pearce, as should, upon the decease of his the said testator's said cousin, become entitled to his the said testator's estates, by virtue of that his will*; and, in case such male relation of him the said testator, of the name of *Pearce*, so approved of and adopted by his said cousin *Thomas Pearce* as aforesaid, should, in the lifetime of his said cousin, attain twenty-one years of age, then the said testator willed and directed his said cousin *Thomas Pearce*, during his life, to pay and allow out of the rents and profits of the estates so devised to him for his life, as aforesaid, unto such male relation, from the time of his attaining twenty-one years of age, the whole of the said annual sum of 200*l.*; provided also, and the said testator declared, that it should be lawful for, and he did thereby authorize and empower, his said cousin *Thomas Pearce* to demise or lease all or any part of his said manors, farms, lands, and tenements, for any term or number of years not exceeding seven years, to take effect in possession, and at the best and most im-

proved annual rent, presently payable, and without taking any fine or premium, as therein mentioned. *Esch. of Pleas,*
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The said *Richard Pearce*, the testator, departed this life on the 3rd day of *January*, 1814, without leaving any issue, and without having revoked or altered his said will. *Thomas Pearce*, the said tenant for life named in the will of the said *Richard Pearce*, died without issue, and never did in any manner execute the power of adoption or selection of a relation of the said testator under or according to the said will.

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The next or nearest relations, or nearest of kin, of the said testator *Richard Pearce*, living at his decease, of the name of *Pearce*, being males, were his three first cousins; first, the said *Thomas Pearce*, the tenant for life, who was the son of *Robert Pearce*, deceased, who was the uncle of the said *Richard Pearce*, the testator; secondly, *Richard Pearce*, the plaintiff in this suit, who was the son of the said testator's uncle *William Pearce*; and, thirdly, *William Pearce*, the brother of the said plaintiff; and the aforesaid three cousins were, at the time of the decease of the said *Richard Pearce*, the testator, of the respective ages following, viz. the said *Thomas Pearce*, sixty-seven years, the said *Richard Pearce*, the plaintiff, sixty-six years, and his brother, the said *William Pearce*, fifty-nine years. It appeared, also, from a pedigree annexed to the case, that the testator had a brother of the name of *Zachary*, who had gone to sea, and had not been heard of for many years. The questions for the opinion of the Court were—

First.—Whether, under the circumstances stated, *Thomas Pearce* took any and what estate under the ultimate limitation contained in the will of the testator?

Secondly.—Whether the plaintiff, *Richard Pearce*, took any and what estate under the ultimate limitation in the will?

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Rogers for the plaintiff.—The questions in this case resolve themselves, in point of fact, into one, whether, under this devise, by possibility, *Thomas Pearce*, the tenant for life, could take under the will an estate in fee? Every provision contained in it excludes him from taking more than a life estate. In default of appointment the devise is to the *next* of kin. The limitations, in default of appointment, are to parties who should be entitled *after him*. In the next clause, lower down, there are passages which give this construction complete confirmation. The testator gives the right to present to the advowson, in default of the other persons mentioned exercising their prior right, to his cousin *Thomas Pearce*, to present *to at all times during the life of him the said Thomas Pearce*. And the testator bequeaths his plate, books, and pictures, household goods, &c., at *Husbands Bosworth* and *Stanwick*, to his executors, in trust to *permit and suffer his said cousin, Thomas Pearce*, to have and enjoy the same *during his life; and after his decease*, then in trust *for the person who should succeed to or inherit his the testator's real estates by virtue of that his will*. This clearly shews that the testator intended that the person nearest of kin of his name, not being *Thomas Pearce*, the tenant for life, should be the person in whom the estates should vest on the death of *Thomas Pearce*, or that the reversion, subject to *Thomas Pearce's* estate, should vest in the next of kin. In the case of *Bird v. Wood* (a), certain stock was devised to trustees, upon trust to pay the interest and dividends thereof unto the testatrix's daughter *Mary*, during her life, and, after the death of her daughter, to transfer the stock and pay the interest to such person as her daughter should appoint, and, in default of appointment, upon trust to transfer the stock and pay the interest unto the testatrix's own next of kin, according to the statute

(a) 2 Sim. & Stu. 400.

of distributions, to be considered as a vested interest from the time of the testatrix's death. The testatrix's daughter died without ever having had a child, and without having executed the power of appointment; and Sir *John Leach*, then Vice-Chancellor, held "that the persons who, at the testatrix's death, would have been her next of kin, if her daughter had been then dead without children, were plainly intended there." And said, "the daughter could not be such next of kin; for the persons intended were to take at her death; and the persons intended must have been living at the death of the testatrix, for their interests were then to be vested." The difficulty in these cases generally has been, at what period you are to ascertain who is the person to take—whether the persons living at the testator's death, or at the death of the tenant for life? It has been held to be the former. The Master of the Rolls says, in the case before cited, "The persons intended must have been living at the death of the testatrix, for their interests were then to be vested." So that, according to that decision, the gift to the next and nearest of kin excludes the tenant for life, that is, *Thomas Pearce*. But again, the testator saying, next and nearest of kin, must mean next and nearest to *Thomas Pearce*. The term is used relatively; common sense says this is the proper construction. The general rule of construction is laid down in the case of *Leigh v. Leigh* (a). There Mr. Justice *Lawrence* says, speaking of the construction of the will, "That depends on whether the plaintiff comes within the meaning of the words, as they have been used by the testator; and though it be true, that, if that meaning be ascertained, no reasoning from supposed cases can induce the Court to put a different construction upon the will, but can only lead to a conclusion that the testator did not see all the consequences of the disposition he may have made,

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yet, in endeavouring to ascertain the meaning of the testator, the absurdities, improbabilities, and inconsistencies, which may arise out of cases falling within one construction or another, have constantly been attended to, with a view of ascertaining such meaning." Applying that doctrine to the present case, there would be the extreme absurdity of making a tenant for life, with a special power of appointing to a person to take after him, take an estate in fee, quite inconsistent with the power given. It is obvious that the testator never intended that *Thomas Pearce* was to take more than an estate for life. Then there is the gift of the personal estate to such person as should be entitled to the estate by this will at *Thomas's* decease. *Doe v. Turner* (a), shews that the Court will supply a word in a will to give a grammatical construction to it, and to carry the intention of the testator into effect. There the Court supplied the words "to him," in order to give the testator's nephew a fee. If it is said, that the words, "next of kin," must include *Thomas Pearce*, then the Court will introduce the words "except *Thomas Pearce*," in order to effectuate the intention of the testator.

Preston, contra.—The Courts will never supply words except from necessity. If *Thomas Pearce* had left a son and heir, and had become insane, so as not to be capable of making an appointment, is there any thing to shew that the testator intended that that son should not take? [*Bailey, B.*—Might he not have taken as next of kin?] The only case in favour of the plaintiff is *Bird v. Wood*. In that case there is an important clause in the will which has not been quoted, "except only as to any child that might be afterwards born of her daughter." That necessarily excluded the daughter, because, if it had not been there, then the child, if she had any, would have been included.

(a) 2 Dow. & Ry. 398.

That is the only ground, consistently with the authorities, upon which that decision can be supported. There is nothing here shewing an intention to exclude the family of *Thomas Pearce*, if there had been any. He is not to be simply tenant for life, but to have power to appoint. There is no authority which will exclude the words from having their general meaning; and, if they have their general meaning, then the plaintiff must fail. *Thomas Pearce* was to have the right to alter the destination of the property, but he has not thought right to exercise it. In *Holloway v. Holloway* (a), the testator, by a codicil, gave to trustees the sum of 5000*l.*, in trust to put the same out at interest, and to pay the interest to his daughter Mrs. *Hindes* during her life, separate and apart from her husband. Then came the following clause: "And after the decease of my said daughter *Hindes*, then, upon further trust, that the trustees do pay the said sum of 5000*l.* unto such child or children of my said daughter *Hindes* as she shall leave at the time of her decease, in such proportions as she shall think proper to give the same. And, in case she dies, leaving no child, then as to 1000*l.*, part of the said 5000*l.*, in trust for the executors, administrators, or assigns of my daughter. And as to 4000*l.*, remainder of the said 5000*l.*, in trust for such person or persons as shall be my heirs-at-law." The testator died, leaving Mrs. *Hindes*, and two other daughters, his next of kin at the time of his death. Mrs. *Hindes* died without issue, and it was held that the 4000*l.* vested in Mrs. *Hindes* and the two other daughters, being his co-heiresses at law and next of kin at the testator's death. That was a stronger case than the present, for there there was a provision to Mrs. *Hindes* during life; and, therefore, it might be fairly said, that the testator intended that she should not take any thing more than what he expressly gave her. So, in *Doe*

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v. Lawson (a), the testator devised to his natural son; and in case of his marriage with certain persons, or his dying without issue, then to his nephew for life; *and, after his decease*, then for and amongst *such person and persons*, his and their heirs, &c. *as should appear and could be proved to be his next of kin*, in such proportions as they would, by virtue of the statute of distributions, have been entitled to his personal estate if he had died intestate: and it was held, that the distribution was to be amongst those who were the testator's next of kin *at the time of his death*, though the nephew, to whom a prior life estate was given, were one of them. There the words were, "and after his decease." The struggle there was to postpone the time of vesting to the death of the son. [*Bayley, B.*—There, the class of persons were to take who appeared or could be proved to be his next of kin. *Lord Lyndhurst.*—There was no inconsistency there.] It is submitted, that there is no inconsistency here. There is nothing in the argument drawn from the bequest of the personal estate; as it is obvious, that, under this will, the personal estate might go to other persons. But, it was the object of the testator, that the property should go to his heir-at-law. The plaintiff does not answer that description, for *Thomas Pearce* was the testator's heir-at-law. It has been said, that it was intended for the eldest male relation, not being *Thomas Pearce*; but, suppose *Thomas Pearce* had died, leaving a son, would the Court say that he was excluded? Words of exclusion are never supplied, unless the Court is forced by necessity to do so. [*Lord Lyndhurst.*—If *Thomas Pearce* took the life estate, he would, according to your argument, take the whole interest. What was the use of giving him the power of appointing? Why incumber him with these powers, when, according to the argument, he would be entitled to the whole interest?] If

(a) 3 East, 278.

ever there was a case for the exclusion of the person taking the life estate, it was the case of *Doe v. Maxey* (a). That was a very strong case against its being held that the gift of a life estate will exclude the tenant for life from taking the fee. [*Bayley, B.*—I think the question there was, whether a remainder continued contingent until a particular death, or whether it vested before; and the Court held that it vested at the death of the testator.] But, the Court could not have arrived at that construction, without holding that the gift of the life estate was not sufficient to exclude him from taking the fee? In that case, the testator devised all his real estate (except the estate at *Swinstead*) to the head of his family for life, and then to several of the junior branches in succession, to each for life, with remainder to his first and other sons in tail male, with the ultimate remainder *to his own right heirs*; and then devised his estate at *Swinstead* to some of the junior branches, but not to all of those to whom he had devised the first estate, to each for life, with remainder to his first and other sons in tail male; “and, for default of such issue,” devised that the estate at *Swinstead* should go to such person and persons, and for such estate and estates, as should *at that time*, (viz. on the death of the last tenant for life without issue male), and from time to time afterwards, be entitled to the rest of his real estates *by virtue of and under his will*: and the Court held, that the ultimate remainder in fee of the estate at *Swinstead* vested *by descent* in the person *who was the testator's heir at the time of his death*, and should not remain in contingency under the will until the death of the last tenant for life without issue male, who was named in the devise of that estate. So, that there is no rule of law that excludes the person taking the life estate from taking the fee; and, unless it is shewn from the context that the description applicable to him applies

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better to others, he is not excluded. Here *Thomas Pearce* answers every part of the description substantially and literally. The plaintiff does not answer the description, except by a forced construction, and without bringing in words to assist him. [Lord *Lyndhurst*.—There was a *Zachary* who was a brother of the testator's. A son of his might have appeared.] That might account for the terms of this will. There is less reason for excluding *Thomas Pearce* now it is ascertained that there is no descendant from *Zachary*.

Rogers, in reply. [Lord *Lyndhurst*.—Where is the inconsistency, if you suppose that the testator thought that *Zachary* was alive, or had left sons?] *Thomas Pearce* had a power of excluding *Zachary*. [Bayley, B.—But suppose he did not, then *Zachary* would have taken; he would have been nearer. It would then be, I give my estate to *Thomas Pearce* for life, with a power of appointment, and, in default of appointment, to *Zachary*, if living, with remainder to his descendants, remainder to *Thomas*, remainder to *Richard*. Supposing that *Thomas* did not take a fee, there would be this difficulty, that if *Thomas* had married and had a son,—he might have been born after the death of the testator, and then the son could not have taken. Suppose *Thomas* to have been living at the death of the testator, and to have married afterwards and had a son, at the death of *Thomas Pearce* that son would have a claim to the estate, if *Thomas* took a fee, but not if he took a life estate.] If *Thomas Pearce* had had issue, why should he not exercise the power in their favour? [Lord *Lyndhurst*.—You want us to do violence to the words used here. You say there is contradiction and inconsistency. What is the inconsistency if the testator had *Zachary* in contemplation?] As to *Holloway v. Holloway* (a),

(a) 5 Ves. 399.

which is said to bear closely on this, that was merely leaving the property to go as it would at law. In *Doe v. Maxey*, it was a disposition of the ultimate reversion to the testator's heir-at-law; and Lord *Ellenborough* said, "Is it not the same as if it had been to his own right heirs?"

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The following certificate was afterwards sent:—

This case has been argued before us by counsel; we have considered it, and are of opinion, that, under the circumstance, here stated, if *Zachary Pearce*, the testator's brother, died without issue in the lifetime of the testator, *Thomas Pearce* took, under the ultimate limitation contained in the testator's will, an estate in fee simple in the testator's real estates, and an absolute interest in his personalty.

LYNDHURST,
J. BAYLEY,
J. VAUGHAN,
W. BOLLAND.

HILDYARD v. BAKER.

A WRIT of *elegit* was delivered to the sheriff of *Midlesex* on the 3rd of *April*, returnable on the 15th. On the 6th of *April* the goods of the defendant were seized under the writ. The sheriff having been told that the action would probably be settled, allowed the time for the return to expire without selling or making any return.

The Court will not alter the return of a writ of *elegit* to a later day; at all events, not at the instance of the sheriff, without the consent of the plaintiff.

Tyrwhitt now moved, on behalf of the sheriff, to alter the writ, by making it returnable on the last day of term.

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BAKER.

BAYLEY, B.—Can we amend a writ of execution by altering the time of the return? Is there any instance where it has been done? Here the writ was returnable on the 15th, and you move on the 30th to alter the day of the return. At all events it could not be done without the plaintiff's consent.

Rule refused.

GILMOUR v. KING.

At a meeting of the creditors of a bankrupt for the choice of assignees, the creditors all refused to become assignees, and requested *A. B.*, a stranger to the estate, to become assignee. *A. B.* stated that he would incur no liabilities; but on the engagement of the solicitor to the commission to indemnify him against the consequences *A. B.* consented to become assignee:—*Held*, that this engagement was not illegal.

ASSUMPSIT on the following undertaking:—

“ Mr. *J. B. Gilmour*, “ *London*, 23rd Oct., 1829.

“ Sir,—In consideration of your having assented to become assignee under a commission of bankruptcy against *Charles Edward Gadderer* and *John Charles Edwards*, at my express wish and to oblige me, I hereby agree to hold you harmless and indemnified against all costs, charges, and expenses to which you may become liable in consequence of being such assignee. I am, Sir, &c.

“ *W. H. King.*”

At the trial before *Bolland, B.*, at the *London* Sittings in *Hilary* Term last, it appeared that, at a meeting of the creditors of *Gadderer* and *Edwards*, under a fiat of bankruptcy against them, no creditor would consent to become assignee. The plaintiff, who was present, was applied to by the creditors to become the assignee, but he said that he would incur no liability or risk of loss. Upon the defendant, who was the attorney to the commission, giving him the above-stated indemnity, the plaintiff consented to become assignee. He was accordingly appointed; and the present action was brought to recover the amount of costs, charges, and expenses, to which the plaintiff had become

liable in consequence of having become such assignee. It was objected, that the agreement was void, it being against the policy of the law that the solicitor to the commission should give such indemnity to the assignee. A verdict having passed for the plaintiff, under the direction of the learned Judge,

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Hutchinson obtained a rule to enter a nonsuit; against which cause was now shewn by—

John Williams and Hoggins.—In the present case there was no pretence for saying that the agreement was illegal or fraudulent. The affairs were in confusion, and would have gone to ruin. All the creditors refused to act as assignees. The plaintiff did not obtrude himself; on the contrary, it was at the request both of the creditors and of the bankrupt that he was induced to consent to become the assignee. There is no authority for saying that it is illegal, that the solicitor to the commission should indemnify the assignee. In *Ex parte Steele (a)*, Lord *Eldon* held, that the solicitor choosing himself assignee was no ground for superseding the commission. *Ex parte Wilson (b)*, is a widely different case. It was there held a contempt for a petitioning creditor to strike a docket at the instance of a solicitor who undertakes to prove the act of bankruptcy, and to guarantee the petitioning creditor against any expenses he might be put to by issuing the commission. In that case, the proceedings were to be instituted in consequence of the guarantee of the solicitor; in the present case, the commission had issued. The contract here was for the benefit of the creditors; it was entered into at a public meeting, and the creditors were aware of, and assented to, the arrangement.

(a) 16 Ves. 166.

(b) Buck, 306.

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Hutchinson, in support of the rule.—The contract in question is bad, as being against the policy of the law. 'There is nothing in the circumstances of the case to take it out of the general rule. Where the assignee has received a guarantee, he ceases to be the controlling party. The real control and management is vested in the solicitor who has given the indemnity. In *Ex parte Badcock* (c), the Lord Chancellor (Lord *Lyndhurst*) said, "There is another part of this case to which I feel bound to allude. I am of opinion that an assignee is not entitled to act as solicitor to the commission; it is part of the assignee's duty to direct and control the proceedings of the solicitor; and if the offices be held by the same individual, that check must necessarily be lost. I think in reason, and upon principle, that the same person should not be permitted to fill two offices, one of which is in its nature responsible to the other." It can be of no consequence as to the illegality of such an agreement, whether it be before or after the issuing of the commission, though it may be of importance to the question whether the party has, or has not, been guilty of a contempt of the Great Seal. [*Bayley*, B.—You do not say that it would have been illegal to take an indemnity from the other creditors, but that the solicitor must not give it. In *Ex parte Wilson*, the assignee was not a stranger. It was a case where he was binding himself to be the petitioning creditor, on an indemnity from the solicitor, whose interest it was to take out the commission. I do not see why the assignee should not do his duty because he is indemnified by the solicitor against loss. The Lord Chancellor may, in the exercise of his discretion, restrain the solicitor from becoming the assignee. If he do not restrain him, is it illegal in him to become assignee?] It is submitted that it would be illegal, because it is against the general policy of the law

(c) *Montague & M'Arthur*, 243.

that the solicitor, who is so greatly interested, should also fill the character of the assignee, who ought to exercise a controlling power over the conduct of the solicitor to the commission. In *Murray v. Reeves* (a), an agreement that a creditor of an insolvent debtor should withdraw his opposition to the discharge of the insolvent, and should be appointed the assignee of the estate, and receive 100% out of it, was held to be against public policy; because all the creditors and the public at large have an interest that the case of an insolvent should be duly sifted; and a bargain, which had for its object the withdrawing the insolvent from being so sifted, was therefore illegal and void. Here, it is clearly for the interest of the creditors that the assignee should exercise a control over the solicitor to the commission; and an agreement which, in effect, takes away such control, must be against the policy of the bankrupt law, and therefore illegal and void.

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BAYLEY, B.—I am of opinion, that this bargain, which has been entered into by Mr. King, is not illegal. *Gilmour* was a stranger to the estate; he was asked by the creditors to come forward, and there was no room for supposing that he would not do his duty. He is asked to undertake the office of assignee, no creditor being willing to accept it. It was necessary that somebody should be assignee. Was it to be expected that a stranger should voluntarily take upon himself the risks and liabilities of this office, from which he could not honestly derive any benefit? Accordingly, he says publicly that he will be liable for no loss. On the indemnity given by the defendant, however, he consents to become the assignee of the bankrupt's estate. It is objected, that the person giving the indemnity is the solicitor to the commission; and it is said to be contrary to his duty as solicitor to the commission to in-

(a) 8 B. & C. 421; 2 Man. & Ryl. 423.

[illegible]

he has given me a copy of the letter from the attorney general and King's counsel, and the attorney general has said that he has no objection to the removal of the defendant from the custody of the sheriff, and if he had caused the defendant to be removed from that situation, it would not have taken away the liability of the defendant in indemnity to the plaintiff according to the agreement.

VALLAN, B., emended.

HILLIANT, B.—It does not appear to me that the guarantee is necessarily illegal, because it is given by the solicitor to the commission. The case does not stand merely as upon a bargain made between the solicitor and the

assignee to the commission; but there is a public meeting at which the plaintiff was applied to by the creditors to become the assignee; he tells them that he will not subject himself to any liability of loss; out of this naturally flows the transaction of giving the guarantee; which, under the circumstances of the present case, is not in my opinion illegal.

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GURNEY, B.—I think that the circumstances which passed at the meeting divest the agreement to indemnify of any fraudulent character.

Rule accordingly.

HILL v. MAULE.

ON a motion for a *distringas* by *Petersdorf*, it appeared from the affidavit that the copy of the writ of summons had been left on the second instead of the last time of calling.

The affidavit to obtain a *distringas* must state that a copy of the writ of summons was left at the last time of calling.

Price and *Godson* made the same motion in other cases on similar affidavits.

The Court expressed an opinion that the copy must be left at the last time of calling; but said, that, as it was a point on which it was desirable that the decisions in all the Courts should be uniform, they would consult the other Judges.

On a subsequent day, Lord *Lyndhurst*, C. B., said, that they had conferred with the Judges of the other Courts, and that all the other Judges were of opinion that the copy must be left at the last time of calling.

The rules were refused.

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M'CURDAY v. DRISCOLL and Others.

A plea which professes to justify several assaults and false imprisonments laid in separate counts, must shew distinct occasions upon which the defendant was justified in committing each particular trespass.

TRESPASS for assault and battery. The declaration contained several counts, complaining of several assaults, batteries, and imprisonments.

The defendants pleaded several special pleas, each going to the whole declaration. Each special plea confessed all the trespasses laid in the several counts, and assumed to justify them under process of the Palace Court; and the plea on which the question arose alleged, that the plaintiff at the time when, &c., forcibly resisted and opposed the execution of the process; wherefore the defendants, in order to arrest the plaintiff, and to overcome his forcible resistance and opposition, and because they could not otherwise arrest him, nor overcome his resistance and opposition, committed the several trespasses in the declaration mentioned.

Special demurrer assigning, among other causes, that the plaintiff having alleged several causes of action, the defendants, though assuming to answer all, had answered but one only; and that the defendants had, in effect, alleged the distinct causes of action laid by the plaintiffs to be one and the same cause.

Platt, in support of the demurrer, was stopped by the Court, who called on—

Byles to support the pleas.—It is conceded, that if a plea assume to answer the whole declaration, and in fact answer but part, it is bad in substance. So, if it allege causes of action laid in the declaration as several and distinct to be one and the same, it is bad on special demurrer; because it imposes on the plaintiff this alternative, either to take issue on an immaterial point, or else

to abandon some cause of action (a), although this mode of pleading is, in order to avoid prolixity and expense, very common. But the plea here confesses distinct trespasses, and then alleges one continuing cause, adequate to the justification of them all. It alleges the plaintiff's resistance and opposition to the execution of process, which is *prima facie* a continuing cause. It then alleges that such opposition made the several trespasses necessary, which it could not have done unless it had been a continuing resistance, and in duration co-extensive with the series of trespasses. Besides, the Court will supply the words for which the &c. is a substitute. Those words being supplied, the plea will allege, that, at the time when each of the trespasses is respectively alleged to have been committed, the plaintiff forcibly resisted and opposed. That is an allegation that each trespass had for its cause a corresponding opposition to the execution of process. And this construction of the plea does not make the plea double; for though it so contains different answers to different parts of the declaration respectively, the whole plea amounts but to one answer to the whole declaration. If it be said that the continuance of the cause is only alleged by way of argument and necessary inference, and not positively averred as it ought to have been, the answer is, that argumentativeness must be assigned for cause of special demurrer, *Peteht v. Woolston* (b), and this demurrer, though special, does not assign argumentativeness for cause.

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LORD LYNTHURST, C. B.—It does not appear that there was more than one cause for all these trespasses.

BAYLEY, B.—There are six assaults and four imprison-

(a) See *Aitkenhead v. Blades*, 5 Taunt. 198; *Freeman*, 367; 2 Chitty, 291; 1 Chitty on Plead. 472.
(b) *Aleyn*, 48; *Com. Dig. Plead.*, E. 3.

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ments laid in the declaration. The party justifying is bound to cover the whole. I see no reason which you give for assaulting him six times. You profess to justify four imprisonments. You should have shewn that circumstances existed by which you had a right to imprison him, whereupon you imprisoned him once; and then, that such and such circumstances occurred, whereby you had a right to imprison him again, wherefore you imprisoned him on the second occasion; and so throughout. But here you do not shew any different occasions.

The rest of the Court concurred.

Judgment for the plaintiff.

MASON v. POLHILL.

Where the assignees of a bankrupt proceed with an action brought by the bankrupt, they must give security for all the costs. An application for security for costs in such a case, held not too late, although not made until the end of *Easter Term*, the *fiat* having issued in *November*, and the plaintiff having, before *Easter Term*, given notice of trial for the sittings after that term.

THIS was an action brought in *Easter Term*, 1832, for pirating an opera. The cause stood for trial at the sittings after *Trinity Term*; but, in consequence of some negotiations for a settlement, the case stood over.

The plaintiff became bankrupt in *November*, and the assignees, against his wish, went on with the proceedings, and, previous to this term, gave notice of trial for the sittings after this term.

Ryland, on the 4th of *May*, obtained a rule *nisi*, calling upon the assignees to give security for costs; against which cause was now shewn by—

Chilton.—The *fiat* was granted in *November*, and the application is too late. The assignees gave notice of trial before the end of the term. At all events, the assignees

ought not to be called upon to give security for costs incurred before they had any thing to do with the action.

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BAYLEY, B.—They are to receive the benefit of all the proceedings, and must, therefore, find security for all the costs. With respect to the lapse of time, this is not like a case of irregularity. It is a matter of right that those who are to benefit by the proceedings should be liable for the costs.

Rule absolute.

BROOKE and Another v. COLEMAN.

THE defendant in this case had obtained a Judge's order for delivering up the bail-bond to be cancelled on entering a common appearance, unless this Court should otherwise order, on the ground of a defect in the affidavit to hold to bail.

In an affidavit to hold to bail on a promissory note or bill of exchange, the amount for which the instrument is drawn must be specified.

The affidavit stated, that the defendant was "justly and truly indebted to the plaintiffs, as assignees of *A. B.*, a bankrupt, in 51*l.* 9*s.*, upon and by virtue of a certain bill of exchange, drawn by the said bankrupt antecedently to the *fiat* of bankruptcy issued against him, upon and accepted by the said defendant, payable two months after date, and now remaining due and unpaid." The ground of the application to the learned Judge who made the order was, that the affidavit was insufficient, for not stating the amount for which the bill was drawn, or the date, or to whom it was made payable.

Erle obtained a rule to shew cause why the learned Judge's order should not be set aside. He cited *Hanley*

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v. Morgan (a), and *Lewis v. Gomperts (b)*, in which the objections as to the amount not being stated, if valid, would have been decisive; and he contended, that there was no authority for saying that it is necessary to state the date.

Kelly shewed cause.—The amount must be stated. The party is only liable to arrest for the principal, and not for the interest, unless it is made expressly payable on the face of the bill. [*Bayley, B.*—Interest does not begin to run until the bill is dishonoured; from that time it bears interest, which may be recovered as damages. But if the interest is specified on the face of the bill, it carries interest from the date.] Juries may give interest even where the interest is not specified, but they are not bound to do so. If they do, it is by way of damages, and they are sometimes told by learned Judges that they are not bound to allow it. [*Bolland, B.*—In *Du Belloix v. Lord Waterpark (c)*, the jury, under the circumstances of the case, refused to give interest, and the Court of *King's Bench* thought that they were right.]

Erle, contrà, relied on *Lamb v. Edwards (d)*, *Bradshaw v. Saddington (e)*, *Lamb v. Newcomb (f)*, *Warmesley v. Macey (g)*, and said, that in these and many other cases this objection might have been made, if it had been supposed that there was any validity in it.

BAYLEY, B.—We will confer with the other Judges. It certainly has been a considerable time before this objection has been taken, though it might often have arisen. If, however, the other Courts have lately been in the habit of deciding that it is necessary that the amount should be

(a) 2 C. & J. 331.

(b) 2 C. & J. 352.

(c) 1 Dowl. & Ry. 16.

(d) 5 J. B. Moo. 14; 2 B. & B.
343.

(e) 7 East, 94.

(f) 2 B. & B. 343; 5 J. B.
Moo. 14.

(g) 5 J. B. Moo. 52; 2 B. & B.
338.

stated, it is desirable that all the Courts should be uniform in their decisions on the point. If interest is only recoverable as damages, it is not a part of the debt; the averment that the defendant is *indebted* may, perhaps, be thought to amount to an averment that he is indebted for *principal*.

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On a subsequent day—

BAYLEY, B., said—We have applied to the Judges of the other Courts on the subject of this motion; and we find that their opinion is, that, in an affidavit to hold to bail on a promissory note or a bill of exchange, it is necessary to state the amount. The present rule, therefore, must be discharged.

Rule discharged.

LECHMERE, Bart., and Others v. FLETCHER.

THE first count of the declaration stated, that the defendant and one *Thomas Fulljames*, heretofore and *more than six years before the commencement of this suit*, to wit, &c., were indebted to the plaintiffs in a large sum of money, to wit, 250*l.*, for work and labour, commission, money lent, &c. &c.; and that the defendant and *Full-*

A promise in writing, signed by the party chargeable thereby, to pay his *proportion* of a joint debt more than six years old, is a sufficient compliance with the provisions of the

9 Geo. 4, c. 14, s. 1, to take the case out of the statute of limitations, though no amount is specified in the promise; and a plaintiff suing on such promise is not confined to nominal damages, but may recover the whole of such proportion upon proving the amount by extrinsic evidence.

A. and *B.* were jointly indebted to *C.*; after more than six years had elapsed since the debt accrued, *A.* promised in writing signed by him to pay his proportion when applied to. Afterwards, *C.* sued *A.* and *B.* jointly, in *indebitatus assumpsit*, on the original joint cause of action. *B.* pleaded the general issue, and *A.* pleaded the general issue and the statute of limitations. A verdict passed against *B.* on the general issue, and for *A.* upon the general issue and upon the issue on the statute of limitations, and judgment was entered for *C.* against *B.*, and for *A.* against *C.* *C.* afterwards brought a fresh action against *A.*, and declared specially on the new promise to pay his proportion:—*Held*, that neither the recovery against *B.*, nor the verdict and judgment for *A.*, were any answer to the action against *A.* on the new promise.

Payment of money into Court on a special count framed on such new promise to pay the defendant's proportion, and averring the amount of such proportion under a *videlicet*, does not admit, or preclude the defendant from disputing, the amount of such proportion.

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james promised to pay the plaintiffs on request; the count then proceeded as follows:—And whereas before and at the time of the making of the promise of the defendants hereinafter next mentioned, six years from the making of the said promise of the said defendant and *Thomas Fulljames* to pay the said monies to the plaintiffs, and from the time the causes of action of the plaintiffs in respect of the said monies accrued, had elapsed, and the right of action of the plaintiffs against the defendant and *Thomas Fulljames* for the recovery of the said monies had, by reason of such lapse of time, but not otherwise, become barred, by virtue of the statute in such case made and provided; and at the time of the making of the defendant's promise next mentioned, the said several monies had not, nor had either of them or any part thereof, been in any manner paid or satisfied to the plaintiffs or either of them, and they were justly entitled to receive the same monies, to wit, in the county aforesaid. And thereupon, after the said lapse of six years, and within six years next before the commencement of this suit, to wit, &c., the defendant, in consideration of the premises, by a certain memorandum in writing then and there signed by him, promised the said plaintiffs to pay them, at any time, his, the defendant's, proportion of the said monies, in case the plaintiffs would apply, and on their applying to him for the same; and the plaintiffs aver, that the defendant's proportion of the said monies so unpaid amounted to a certain sum, to wit, a moiety of the said monies; and that they, the said plaintiffs, afterwards, to wit, &c., applied to the defendant for, and required him to pay to them, such his, the defendant's, proportion of the said monies.

The second count stated the defendant and *Fulljames* to be indebted, as in the first count, and then proceeded as follows:—And whereas the said several last-mentioned monies being unpaid and unsatisfied, the defendant afterwards and within six years next before the commencement of this suit, to wit, &c., in consideration of the premises

respectively, and that the plaintiffs would apply to him for his proportion of the last-mentioned monies, then and there promised to pay his, the defendant's, proportion of the last-mentioned several monies respectively to the plaintiffs, on such application being made; and the plaintiffs aver, that the defendant's proportion of the last-mentioned several monies was and is a moiety thereof; and that they afterwards, to wit, on &c., applied to him for payment thereof, to wit, in the county aforesaid.

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The third count was the common *indebitatus* count. Pleas—*non assumpsit* to the whole declaration, and the statute of limitations to the third count; and 10s. was paid into Court on the special counts.

At the trial before *Parke, J.*, at the last *Spring* assizes for the county of *Gloucester*, it appeared that the defendant and *Fulljames*, more than six years before the writing of the letter hereinafter mentioned, were indebted to the plaintiffs in the sum of 250*l.* In 1830, the plaintiffs wrote to the defendant claiming that sum; and in *April*, 1831, the defendant wrote a letter to the plaintiffs, in which he said that *Fulljames* had managed the cash concerns of the inclosure (out of which the transaction arose), and added, "I will at any time pay my proportion of the debt due on application for the same." Evidence of the amount of the plaintiff's proportion was given.

It was insisted, on behalf of the defendant, that there was no evidence to take the original cause of action out of the statute of limitations, and that, at all events, the amount not being specified in the letter of the defendant, nominal damages only could be recovered, and that such damages would be covered by the payment into Court.

The defendant also put in an examined copy of a record of an action brought by the plaintiffs against *Fletcher* and *Fulljames*, in which they had declared in *indebitatus assumpsit* upon the original cause of action, and in which *Fletcher* had pleaded *non assumpsit* and the statute of li-

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mitations, and *Fulljames* had pleaded the general issue, and in which a verdict had passed for the plaintiffs against *Fulljames*, and against the plaintiffs for *Fletcher*, on both the issues joined with him; and upon which verdict judgment had been entered up as follows: "Therefore, it is considered that the said plaintiffs recover against the said defendant *Thomas Fulljames*, the said damages, so as aforesaid assessed by the said jury, and also 73*l.* 10*s.* adjudged by the said Court to the said plaintiffs at their request, which damages amount in the whole to the sum of 281*l.* 10*s.*; and the said defendant *Thomas Fulljames* in mercy, &c. And it is further considered by the said Court here, as to the issues within joined between the said plaintiffs and the said defendant *John Fletcher*, that the said plaintiffs take nothing by their said bill against the said defendant *John Fletcher*, but that they be in mercy, &c., for their false claim; and, that the said defendant *John Fletcher* go thereof without day, &c. And, it is further considered by the said Court now here, that the said defendant *John Fletcher* do recover against the said plaintiffs, 45*l.* 18*s.* 6*d.* adjudged by the same Court here, according to the form of the statute in such case made and provided, to the said defendant, *John Fletcher*, for his expenses and costs by him, in his defence in this behalf sustained, and by his assent adjudged" (a).

The defendant insisted that this judgment against *Fulljames*, a co-contractor, was a bar to the present action against *Fletcher*.

A verdict passed for the plaintiff, under the direction of the learned Judge, with leave to the defendant to move to enter a nonsuit.

(a) In the joint action which was in the *King's Bench*, that Court were of opinion, that the plaintiffs could not recover upon *Fletcher's* new promise, (the declaration being

framed on the original cause of action), but must declare specially on the new promise to pay the defendant's *Fletcher's* proportion when he should be applied to.

Curwood obtained a rule accordingly, against which, *Exch. of Pleas, 1833.*
cause was now shewn by

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Ludlow, Serjt.—The payment of money into Court on these special counts admits the whole cause of action, and the amount as averred. Where money is paid into Court on any special count, in which there is a tangible averment of a specific sum being due, the defendant cannot afterwards dispute such amount. *Cox v. Brain (a)*. [*Bayley, B.*—He admits the contract, and the breach of the contract, but he disputes the amount, and asserts, that no more than what has been paid into Court is due. Here the amount is laid under a *videlicet*. In *Stoveld v. Brewin (b)*, the declaration was on an agreement to sell some bark at the average price at which the plaintiff had sold or might sell the same, and there was an averment that such average price amounted to a certain sum, which was laid under a *videlicet*. It was held, that payment of money into Court did not admit the average price. *Vaughan, B.*—In an action on a policy of insurance, by paying money into Court on a count alleging a total loss, you do not admit a total loss. Is the averment of the amount of the proportion in this case so material, that, if another was proved to be the true amount, the plaintiff would have been non-suited?] There is no plea of any judgment recovered, and therefore the plaintiff is not estopped, even if the judgment against *Fulljames* would have been a bar. But it can be no bar, being a judgment on a different question. The cause of action in the former suit was different. It was a joint cause of action for the whole debt. This is a new cause of action against the present defendant, on his new promise to pay his proportion. There was a moral obligation on him to pay at least his proportion. The statute of limitations cannot apply. It can be no answer to a new promise made within the six years on which the plaintiff has declared.

(a) 3 Taunt. 95.

(b) 2 B. & A. 116.

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Curwood, contrà.—It is quite clearly settled, that payment of money into Court admits the contract as laid, and the breach of such contract, but not the amount sought to be recovered. There are two questions in the case:—*First*, whether it is not necessary, under the 9 *Geo. 4.*, that the whole promise should be in writing; and *secondly*, whether the present action is not barred by the recovery against *Fulljames* in the former action. *First*, as to the question on the 9 *Geo. 4.* [*Bayley, B.*—Does the question on that act arise in this case? Can the statute of limitations be taken advantage of where it is not pleaded?] The question is the same as in *Dickinson v. Hatfield* (a). [*Bayley, B.* There the statute was pleaded.] Here, it appears on the declaration, that the original debt would be barred by the statute; but they attempt to take it out of the statute, by shewing a promise in writing. The whole of that promise should be in writing. An acknowledgment or promise, which, before Lord *Tenterden's* act, would take the case out of the statute of limitations must now be in writing. But, it is submitted, that the whole must be in writing, and that it is not competent for a plaintiff to supply any part by parol, which would let in all the mischiefs the late statute was intended to prevent. *Kennett v. Milbank* (b) is an express authority, that such a general acknowledgment of an unascertained amount is not sufficient, within the late act; and in *Dickinson v. Hatfield*, the plaintiff was allowed by Lord *Tenterden* to take nominal damages only. Here, if the plaintiff is entitled to recover upon this promise to pay an unascertained amount, he can only be entitled to recover nominal damages, and these are covered by the 10s. which has been paid into Court.

Secondly.—By the judgment in the former action, the original debt is totally extinguished. *Higgins's case* (c),

(a) 2 M. & M. 141; 5 Car. & P. 46.

(b) 1 M. & Scott, 102; S. C. 8 Bing. 37.

(c) 6 Rep. 45.

Com. Dig. Action (K). [*Bayley, B.*—The plaintiff has no security at all against the present defendant.] The authorities shew, that whether the debt be levied or not, and even if there be a writ of error brought, still, until the judgment be reversed, it is a bar to a fresh action. [*Bayley, B.*—This is not an action upon the same, but upon a new contract; the defendant, by the new contract, binds himself separately, not jointly; he binds himself to pay his proportion only, not the whole—he varies the nature of his liability under the new contract. Suppose, that, on a joint and several promissory note, you sue one and get a judgment, you may sue the other.] That is an excepted case, because the contract is several as well as joint. The case of a joint and several bond is put as an exception to the general rule, at the end of *Higgins's* case. In the former action there was judgment against one co-contractor of a *joint* and not a several debt.

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Cur. adv. vult.

The judgment of the Court was now delivered by—

BAYLEY, B.—This was an action upon a special promise to pay a debt due jointly from the defendant and one *Full-james*, and contracted more than six years before the time when the promise, which is the foundation of the present action, was made.

The first count of the declaration sets out the facts, and then states, that the defendant, in consideration of the premises, by a memorandum in writing, then and there signed by him, promised the plaintiffs to pay them, at any time, his, the said defendant's, proportion of the said monies, in case the plaintiffs would apply, and on their applying to him for the same. It is in consideration of the *premises*, not on any consideration of forbearance; probably, because no such consideration could have been made out to have existed in point of fact. It was not, therefore, a substituted contract, but an additional new contract.

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Two objections were taken to the plaintiffs' right to recover. The first was upon the statute of limitations. The defendant had paid 10*s.* into Court, and had thereby admitted such a contract as that declared on, that is, a promise to pay his proportion when applied to.

The objection on the statute was, that, according to the true construction of the 9 *Geo.* 4, c. 14, s. 1, it is essential that the acknowledgment or promise in writing, to take the case out of the statute of limitations, should specify the amount; and that, where the amount is not specified, nominal damages only can be recovered; and, upon that construction of the statute, the defendant has paid 10*s.* into Court, so as to cover any claim for nominal damages.

The statute of 9 *Geo.* 4, c. 14, s. 1, does not, in terms, state any thing as to the necessity of specifying the amount, either in an acknowledgment or promise; it says only, that "In actions of debt, or upon the case grounded on any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the enactments of the 21 *James* 1, c. 16, unless such acknowledgment or promise be made or contained by or in some writing, signed by the party chargeable thereby."

Mr. *Curwood* relied on *Kennett v. Milbank* (a), as establishing the position, that an acknowledgment or promise is not evidence of a new or continuing contract, unless it specify the amount of the money due. The language of the act of parliament certainly does not lead to the conclusion that such specification is necessary; and, upon looking into the authorities, we do not think that they militate against the conclusion to which we have arrived, that a general promise in writing, not specifying the amount,

(a) 1 M. & Scott, 108; S. C. 8 Bingh. 37.

but which can be made certain as to the amount by extrinsic evidence, is sufficient to take the case out of the operation of the statute of limitations. *Kennett v. Milbank* is relied on as an express authority on the point, in favour of the defendant; but, it will be found, that the present was not the point adjudged upon in that case. It was an action upon a promissory note, and the statute of limitations was pleaded. The plaintiff, to take the case out of the statute, relied on a composition-deed signed by the defendant, which recited, that the defendant was indebted to the plaintiff and others, with a proviso for making void the deed, if all the creditors, to the amount of 10*l.* or upwards, did not sign. The plaintiff did not execute the deed. The deed did not specify the plaintiff's debt; it did not appear that it applied to the debt on the note. Now, as an acknowledgment is only evidence of a promise, some of the Judges of the *Common Pleas* were of opinion, that the deed was not evidence of any new promise; the creditors had not signed, and the deed was void. Others of the Judges put it on the ground, that there was no acknowledgment of *the debt*, for which the plaintiff was suing; and, if there were no acknowledgment of that, then there could be no fresh promise to pay that debt. The opinion of all the Judges who decided that case was, that the deed did not raise any promise, or amount to an acknowledgment from which a fresh promise could be implied. *Kennett v. Milbank* was pressed upon Lord *Tenterden*, in *Dickinson v. Hatfield* (a), where, the plaintiff, to take the case out of the statute of limitations, produced a letter from the defendant, containing a promise to pay the balance due from him to the plaintiff. There was no evidence to prove what the balance was. Lord *Tenterden* said, upon the best consideration he could give the case, the

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letter was evidence of a new or continuing contract, and entitled the plaintiff to a verdict. "The act (he said) does not require the amount of the debt to be specified. Before it passed, a verbal promise to pay the balance would have entitled the plaintiff to recover: a similar promise in writing will have the same effect now; but, there being no evidence to shew what the balance is, there can only be nominal damages." The case of *Dickinson v. Hatfield*, then, instead of being an authority for the defendant, is an authority the other way. What fell from Lord *Tenterden*, was a plain intimation of his opinion on the construction of the statute.

Suppose, a debt exists of considerable standing, and suppose the defendant to write—"I do not know the amount, as we have had no settlement; nothing, however, has been paid, but if you will ascertain what the amount is, I will pay you." I think there is nothing in the statute to prevent evidence being given to prove such amount; and that, if there be such proof, the plaintiff may recover the whole amount, and is not confined to nominal damages.

The next point is, whether this action is barred by the judgment in the former action, which was brought in the Court of *King's Bench*, by the present plaintiffs against *Fletcher* and *Fulljames*, jointly. That action was commenced against *Fletcher* and *Fulljames* after the promise, which was the foundation of the present action, and it charged them jointly with the original cause of action. *Fulljames* pleaded the general issue only, and *Fletcher* pleaded the general issue and the statute of limitations. The mode in which the verdict is entered is singular: there is a verdict against *Fulljames* on the general issue; there is also a verdict for the defendant *Fletcher*, on the general issue, and upon the statute of limitations. How it happened that the verdict was entered against the plaintiffs, and for the defendant *Fletcher* on the general issue, does not

appear. Mr. *Curwood* pressed upon us, and brought before us cases to prove, that, by reason of this judgment against *Fulljames*, the co-contractor of the present defendant, the debt had passed *in rem judicatam*, and was annihilated as a simple contract between the parties; and that, therefore, *Fletcher* was no longer liable to be sued on the joint debt.

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In *Higgins's* case, in debt on bond by an executor, the defendant pleaded a former recovery in the Court of *Common Pleas*, by the testator, upon the same bond, without alleging execution; and the question was, whether the executor was bound to proceed upon that judgment, or was at liberty to have a new action; and it was resolved, that, as long as the judgment remained in force, he could not have a new action. There, the original action by the testator was against the very defendant whom the executor was suing in the second action on the same bond; and the question was, whether the executor had or had not the option of disregarding the judgment, and bringing a new action upon the bond. The Court decided that he had not; and there can be no doubt of the propriety of that decision, because, as laid down in the first resolution in *Higgins's* case, "where a man has a debt on a bond, and by ordinary course of law has judgment thereon, the contract by specialty, which is of an inferior nature, is, by judgment of law, changed into a matter of record, which is of a higher nature." But, in that case, a distinction is taken to this effect, that, where there is a joint and several bond, and you sue one obligor, and have judgment against him, that does not annul the bond, or change it into a security of a higher nature, as against the other obligor; but you may still sue him. This distinction is to be found at the end of *Higgins's* case, where it is said, "And as to the case which has been objected, that where two are bound jointly and severally, and the obligee has judgment against one of them; that yet he may sue the other, it was

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well agreed. For, against him, the nature of the bond is not changed; for, notwithstanding the judgment, he may plead that it is not his deed."

Brown v. Wootton (a), was the case of a tort, which stands on a very different footing from that of a contract. It was an action of *trover*, in which the defendant pleaded judgment recovered against *J. S.* for the same cause of action, and that the plaintiff had *J. S.* in execution for the damages; and the plea was held good, for the cause of action being against divers, for which damages uncertain were recoverable, judgment against one for damages certain makes that certain which before was uncertain, and takes away the action against the others. The damages in that case were originally uncertain; and, where you have reduced the damages, which before were uncertain, to a certainty, you cannot afterwards sue any of the parties whom you were originally entitled to sue. You might, originally, have sued all, but you could not have had different damages against them. The distinction was expressly taken between cases where the demand is originally certain, and where it is for arbitrary damages *per Popham* (b)—"If one have cause of action against two, and obtain judgment against the one, he shall not have remedy against the other; and the difference between this case and debt on an obligation against two is this, because, there every of them is chargeable and liable to the entire debt; and therefore, a recovery against one is no bar as to the other until satisfaction." If, indeed, that were the case of a joint bond, not a joint and several bond, we have been referred to no authority which goes that length; *it may be*, that where you sue, and recover a judgment against one debtor only, on a contract which is joint and not several, that your right to sue on the joint contract is destroyed.

(a) Cro. Jac. 73; Yelv. 68.

(b) Ibid.

That, if so, would be so merely on the ground of the difficulty to which the form of action would give rise. If, on a joint contract, you have sued one and entered judgment against him, there might be an invincible obstacle; because, upon a new action against another of the parties to the contract the defendant would have a right to plead that he made no promise, except with the other defendant, against whom the judgment was entered, and he could not be joined. Therefore, though we have met with no case which establishes the position, we are inclined to think, that, in the case of a *joint* debt, a judgment against one joint contractor would be a bar to an action against another. But, if a defendant is liable separately, as well as jointly, the technical difficulty to which I have referred is removed. In the present case, the original debt was joint, but, afterwards, a new separate contract was entered into by the defendant, binding him only, and binding him to a different extent from that to which the original joint contract would have bound him. He was, originally, bound for the whole debt, but under the separate contract, his liability is limited to his proportion only.

There are many cases in the books as to joint and several bonds (a), from which it appears, that, though you have entered judgment on a joint and several bond against one obligor, you are still at liberty to sue the other; unless indeed the judgment has been satisfied: but so long as any part of the demand remains due, you are at liberty to sue the other, notwithstanding you have obtained judgment against one. This, I think, establishes the principle, that where there is a joint obligation, and a separate one also, you do not, by recovering judgment against one, preclude yourself from suing the other. Then, does the bringing the first action against the two on the original *joint* obligation operate as a bar to the pre-

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sent action? The separate contract is not put as a substitution for the joint obligation; and, looking at the consideration as stated, it is clear that it was no part of the consideration that *Fletcher* should be relieved from the joint obligation, or that the plaintiffs should be prevented from suing on the joint obligation. This could not have been the case; there was no intention to give up *Fulljames's* liability on the joint contract; and, to sue *Fulljames*, the plaintiffs must have sued *Fletcher* also. It was not, therefore, the intention of the parties to give up the power of suing *Fulljames*. It would, indeed, have been unfair in the plaintiffs, and at variance with this second agreement, to have enforced payment of the whole from *Fletcher*; but their power to sue *Fletcher* on the joint contract was not taken away.

Another question has occurred to us, whether the verdict in the original action, being found for *Fletcher* on the general issue and on the statute of limitations, can operate as a bar to this action; but we are of opinion it cannot. The verdict on the general issue is no bar to the present action; because, in this action evidence is admissible which would not have been admissible in the former action. *Fulljames* could not have been a witness in the former action, because he was a party thereto. The plaintiffs might have failed in that action, for not making out *Fletcher* to be a co-contractor; but in this case they might call *Fulljames* as a witness. The rule is, that where the same evidence will maintain both actions, a recovery or judgment in one will bar the other (a). Where one action can be maintained by evidence which is not admissible in the other, a judgment will not be a bar.

The verdict found for *Fletcher* in the former action upon the issue on the statute of limitations can be no bar in this action. The question in this action upon the sta-

(a) Sir T. Raymond, 472.

tute is different from the question upon the statute in the joint action. The question there was, whether *Fletcher*, within the six years, had done any thing to make himself jointly liable for the whole. The question here is, whether he has not made himself liable separately for his proportion. In the former action, the joint debt was barred by the statute. The present contract would not take the joint debt out of the operation of the statute.

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Even assuming, then, that the 9 *Geo. 4*, applies to this case, and that the point insisted upon by the defendant can arise upon these special counts, to which the statute of limitations is not pleaded, still we are of opinion that the promise in writing was a sufficient compliance with the 9 *Geo. 4*, to take the case out of the statute of limitations, as far as relates to the defendant's proportion of the debt, and that the recovery in the former action does not bar the plaintiffs from recovering in this.

Rule discharged.

ROGERS v. LANGFORD.

SPECIAL *assumpsit* on a warranty of certain country bank notes, with the money counts. Plea—general issue.

At the trial, before Lord *Lyndhurst*, C. B., at the *Welchpool* Summer Assizes, 1832, it appeared, that, on *Wednesday*, the 23rd of *November*, the plaintiff paid the defendant at *Oswestry* five 5*l.* notes of the *Mold* bank, the price of barley sold by the defendant to him. That on *Monday*, the 28th of *November*, the defendant called at

On *Wednesday*, the 23rd of *November*, *A.* bought goods from *B.*, which he paid for in country bank-notes. On *Monday* the 28th *B.* requested *A.*'s servant, as a favour, to exchange the notes for money, which he ac-

cordingly did. On the same day the bank stopped payment; *A.* heard of it on *Tuesday*, and on *Wednesday* wrote to *B.*, informing him of the failure of the bank, and desiring him to exchange the notes; but the notes were not produced or tendered to *B.* until long afterwards, nor were they ever presented at the bank. In an action brought by *A.* against *B.*, to recover the value of the notes, held that *A.* was not entitled to recover.

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the plaintiff's shop, at *Welchpool*, and produced to his shopman, *John Davies*, five *5l. Mold* bank notes, stating that he had received them from the plaintiff on the *Wednesday* previously, and requested *Davies* would favour him by exchanging them for him, which he accordingly did. It appeared that *Davies* did not know otherwise than from the defendant, that he had received the notes from the plaintiff, and that he did not exchange them on that account, but merely to oblige the defendant. It further appeared, that about two o'clock on *Monday*, the 28th of *November*, the day on which *Davies* changed the notes, the *Mold* bank stopped payment, and subsequently became bankrupt. That on *Tuesday* night, the 29th, the plaintiff was informed of it, and on *Wednesday*, the 30th, wrote a letter to the defendant, informing him of the stoppage of the bank, and desiring him to exchange the notes. That no reply having been received, *Davies*, by direction of the plaintiff, waited upon the defendant on *Tuesday*, the 6th of *December*, and tendered the five *5l. Mold* notes; but that the defendant refused to receive them. It was admitted that a mail left *Oswestry* every morning at ten o'clock, which arrived at *Mold* at eight o'clock on the following morning. That a mail left *Mold* at eight o'clock every evening, and arrived at *Oswestry* at three o'clock the following afternoon. That a mail left *Welchpool* at seven o'clock every morning, and arrived at *Mold* at eight o'clock the following morning; and that a mail left *Mold* every night at eight o'clock, and arrived in *Welchpool* at four o'clock the following afternoon. The notes were not produced at the trial, but the plaintiff gave evidence that a second tender of them had been made to the wife of the plaintiff, and, that she refusing to receive them, they were left on the ground near her. An objection was taken by the defendant, that they ought to have been produced at the trial, inasmuch as the defendant, if liable on his gua-

rantee of the notes, would be entitled to have them delivered up to him (a). The jury having found a verdict for the defendant, *Lloyd*, in *Michaelmas* Term last, obtained a rule for a new trial, on the ground that the verdict was against the evidence: against which cause was now shewn by

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J. Jervis for the defendant.—In this case the notes were not presented in due time. They ought to have been returned to the defendant by the first post after the plaintiff had notice of the failure of the bank; but the plaintiff's shopman merely writes on the 30th, to inform the defendant of the failure, and the notes are not tendered until the 6th of *December*, a week after he had had notice of the failure. [Lord *Lyndhurst*.—This point was not taken at the trial.] It was not necessary for the defendant to move for a rule to enable him to take an objection which is an answer to the plaintiff's application for a new trial. If the defendant had been an indorser, he would not be liable unless the notes were presented, even if the bankers had become bankrupt. *Bevan v. Hill* (b). In *Hansard v. Robinson* (c), it was held that the holder of a bill of exchange cannot insist upon payment by the acceptor, without producing and offering to give up the bill. There must be a presentment, to make a party primarily liable, even although the acceptor has become bankrupt or insolvent, and the indorser had full knowledge of the fact. *Esdaile v. Sowerby* (d). The same point was decided in *Bowes v. Howe* (e), which was a case of country bank notes. *Camidge v. Allenby* (f), is directly in point. There the vendee, at three o'clock in the af-

(a) This point was afterwards taken by *Jervis*, in his argument on shewing cause; but the Court seemed to think the non-production of the notes at the trial was sufficiently accounted for.

(b) 2 Camp. 381.

(c) 7 B. & C. 90.

(d) 11 East, 114.

(e) 5 Taunt 30.

(f) 6 B. & C. 373.

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ternoon of the 10th of *December*, delivered to the vendor certain notes of the *Huddersfield* bank in payment for goods sold. On the same day, at 11 o'clock, that bank stopped payment, and never afterwards resumed payment; but neither of the parties knew of the stoppage or the insolvency of the bank. The vendor never circulated the notes, or presented them to the bankers for payment: but on the 17th of *December* he required the vendee to take back the notes, and to pay him the amount, which the latter refused; and it was held under these circumstances that the vendor of the goods was guilty of laches, and had thereby made the notes his own, and consequently that they operated as a satisfaction for the debt. There is here no evidence of any express promise that the notes were of the value they purported to be; and the case of *Camidge v. Allenby* shews that no such promise is implied in law. Here both parties were innocent.

Lloyd, contrà.—There is an implied promise, that the notes are worth so much as they purport to be worth. [*Bayley, B.*—Is there any authority for that? They may be of some worth.] Here, the exchange of the notes was by way of favour. It is asked as a favour, and granted as a favour; and thence arises the implied undertaking, that the notes are worth what they purport to be worth. Then, as to the want of presentment. The plaintiff was not bound to present the notes. In all cases where that has been held necessary, the notes were given in payment of a pre-existing debt. Mr. Justice *Bayley* says, in *Camidge v. Allenby*, “The rule, as to all negotiable instruments, is, that, if they are taken in payment of a *pre-existing debt*, they operate as a discharge of that debt, unless the party who holds the instrument does all that the law requires to be done, in order to obtain payment of them.” [*Bayley, B.*—Suppose, instead of giving notice on the *Wednesday*, he had not given notice for a quarter of a year?]

Then it would have been *laches*. [Bayley, B.—And yet there would have been a breach of warranty as much as if they had been presented on the *Wednesday* and not paid. Lord Lyndhurst.—It is possible, if you had returned them in due time, that might have done instead of presenting them.] It is submitted, that, as the notes were exchanged as a favour, and not in discharge of a pre-existing debt, all that the plaintiff was bound to do, was to offer to return the notes. All the cases, as to the necessity of presentment, apply to instances where the notes are received in payment of a pre-existing debt, and not where the transaction is one of mere courtesy and kindness. [Bayley, B.—You give money for these notes. Do not you, by so doing, take on yourselves the ordinary responsibility of presenting the next day? Lord Lyndhurst.—The law will imply a promise to repay *if you do all that is necessary on your part, but not otherwise*.] If it had been a transaction of business, it is admitted that it would be so. In those cases, the party receiving the notes benefits by so doing. Here, it is a favour asked. [Bayley, B.—This was a favour which he had a right to ask. If you had not been guilty of negligence, you might have sent the notes to *Mold* on *Tuesday*. Is there any case where a distinction is taken between a case where the party takes the notes for his own benefit, and where not?] In all cases of exchange there is an implied warranty. [Lord Lyndhurst.—In the case which has been cited, they were received as payment for the debt—in this, they are taken as payment for the money—he exchanges the notes as an equivalent for the debt in the one case, and for the money in the other.] In *Camidge v. Allenby*, Mr. Justice Bayley says, “It is a general rule applicable to negotiable instruments, and not to be relaxed in particular instances, that the holder of such an instrument is to present promptly, or to communicate without delay notice of non-payment, or of the insolvency of the acceptor of a bill, or the maker of a note; for a party is not only entitled to knowledge of insolvency,

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but in consequence of such insolvency, he will be called upon to pay the amount of the bill or note." This shows, that it is not absolutely incumbent on the party to present. Here, notice of the insolvency of the bank was sent in due time, and the defendant was informed that the plaintiff looked to him for payment of the notes. *Henderson v. Ashpitel &c.* was an action of *assumpsit* for goods sold by the plaintiff to the defendant, on *Monday*, the 12th of *December*, at *Darlington Market*. On account of the alarm respecting bankers, it was agreed that payment should not be made until the *Monday* following, the 19th, when the parties again met at *Darlington Market*, and the defendant offered the plaintiff his choice of several country notes, and he selected two 5*l.* notes of the *Stockton* bank, and in the evening went home to *Husworth*. By the course of the post, the notes could not have been presented at the bank at *Stockton* until *Wednesday*, the 21st of *December*. It was proved that the bank paid all day on *Saturday* the 17th, but did not pay on *Monday*, or afterwards. On *Wednesday*, the 21st, the plaintiff met the defendant at *Stockton*, and offered to return or exchange the notes with the defendant, but he refused, saying, that the bank was going on *Tuesday*. The cause was tried in the Court of *Pleas*, at *Durham*, and a verdict having passed for the plaintiff, a motion for a new trial was made before *Bayley*, J., and *Hullock*, B., at Chambers; and after hearing *Chitty* for the plaintiff, and *Cresswell* for the defendant, Mr. Justice *Bayley* said, that he believed the ground of the decision in *Camidge v. Allenby* was, that the notes should be deemed a payment unless returned in a reasonable time: and that the plaintiff, by keeping the notes a week after he had heard of the stoppage, without notice to the defendant, had precluded himself from recovering: but that in that case, as the plaintiff had offered

(a) Addenda to Chitty on Bills, 7th ed. 658.

to return, and the defendant had refused to take back the notes, the plaintiff was entitled to recover. That case not only shews on what ground *Camidge v. Allenby* was decided, but also, that an offer to return the notes in a reasonable time is sufficient without a presentment at the bankers. If the other rule were adopted, it would put a stop to the circulation of country bank notes. [Lord *Lyndhurst*.—In that case, at Chambers, the party offered to return the notes.] Here there is an offer to return the notes on the *Wednesday*. [Lord *Lyndhurst*.—It was no offer to return the notes. This letter merely says that the plaintiff would hold the other party liable. If the notes had been tendered to the defendant on the *Wednesday*, it would have been within the case at Chambers. *Vaughan, B.*—Mr. Justice *Littledale's* judgment in *Camidge v. Allenby* is against your other point on the implied warranty. He says—"I think there is no guarantee implied by law in the party passing a note payable on demand to bearer, that the maker of the note is solvent at the time when the note is so passed."]

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The Court then directed *Lloyd* to inquire whether there had been a tender of the notes to the defendant; and *Lloyd* having, on a subsequent day, informed the Court that there had not been any tender until long afterwards.

BAYLEY, B. said—I think the notes ought to have been either presented by the holder to the bank for payment, or else to have been returned without delay to the defendant, so as to have given him an opportunity of getting payment for them, or of making the best of them; but, as the point was not taken at the trial, the rule must be made absolute.

Rule absolute for a new trial, on payment of costs (a).

(a) The plaintiff did not take the cause down again.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

TRINITY TERM, IN THE THIRD YEAR OF WILL. IV.

EXCHEQUER CHAMBER.

WOLVERIDGE v. STEWARD.

1833.

(*In Error, from the Court of Common Pleas.*)

An assignee who takes from a lessee leasehold premises by indenture indorsed on the lease, subject to the payment of the rent and the performance of the covenants and agreements reserved and contained in the lease, is not liable in covenant to the lessee for rent which the lessee has been called on by the lessor to pay after the assignee has assigned over.

THE declaration stated, that, on the 25th December, 1819, by a certain indenture, made between one *John Easthope*, of the one part, and the plaintiff below, of the other part, the said *John Easthope* did grant, demise, and lease to the plaintiff below, his executors, administrators, and assigns, certain premises in the county of *Middlesex* to hold the same to the plaintiff, his executors, administrators, and assigns, for the term of twenty-one years from the 25th March, then next, yielding and paying therefore the yearly rent of 21*l.*, on the 24th June, the 29th September, the 25th December, and the 25th March, in every year, clear of all taxes and deductions; and, that the plaintiff below, did thereby covenant with the said *John Easthope*, to pay the rent on the days and in the manner therein-before appointed. By virtue of such demise, the plaintiff

below, on the 25th *December*, 1819, entered into and upon the premises, and became possessed thereof for the said term so to him granted; and, being so possessed thereof afterwards and during the term, to wit, on the 22nd *May*, 1821, by an indenture made between the plaintiff below of the one part, and the defendant below of the other part, and sealed with their seals, and indorsed on that part of the said lease sealed with the seal of the said *J. Easthope*, in consideration of 65*l.*, bargained, sold, assigned, transferred, and set over to the said defendant, his executors, administrators, and assigns, the said indenture of lease, and all the premises thereby demised; *to have and to hold* the same from the 28th day of *May* then instant, *for and during* all the remainder of the said term of twenty-one years granted by the said indenture of lease, *subject, nevertheless, to the payment of the existing rent, and to the performance of the covenants and agreements reserved and contained in the said indenture of lease.* And the defendant below, then and there accepted the said assignment; and by virtue thereof, the said defendant below, afterwards, and during the said term granted by the said indenture of lease, to wit, on, &c., *entered into and upon all the said demised premises*, with the appurtenances, and became and was possessed thereof for the remainder then to come and unexpired of the said term of twenty-one years, granted by the said indenture of lease, subject to the payment of the rent, and performance of the covenants reserved and contained in the said indenture of lease.

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Averment of general performance by the plaintiff below of all things contained in the lease and assignment to be performed by him. The plaintiff below then assigned two breaches of covenant. First—in the non-payment, by the defendant below, of one quarter's rent due by virtue of the lease and covenant of the defendant below, therein contained, for one quarter of a year, ending the 25th *March*,

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1831; and secondly, in the non-payment by the defendant below of another quarter's rent, for the quarter ending the 24th June, 1831.

The three first pleas to this declaration terminated in issues in fact.

The fourth plea was, that before the said several sums of 5*l.* 5*s.* and 5*l.* 5*s.* for the rent aforesaid, in the declaration mentioned, or either of them, became due, to wit, on &c., by indenture between the defendant below, of the one part, and one *John Caesar Foley*, of the other part, the defendant below duly assigned the said demised premises, and all his estate and interest therein, to the said *John Caesar Foley*, his executors, administrators, and assigns, to hold the same from the day and year last aforesaid, for the remainder of the said term; by virtue of which assignment, the said *John Caesar Foley* afterwards, and before the said several sums of 5*l.* 5*s.* and 5*l.* 5*s.*, or either of them, became due, entered into and became possessed of the said demised premises, and of all his the said defendant's estate and interest therein.

To this plea there was a general demurrer and joinder in demurrer.

This demurrer came on to be argued in *Trinity* term, 1832, when the Court of *Common Pleas* gave judgment for the plaintiff below. Upon this judgment a writ of error was now brought; and the errors assigned were, that the declaration and the matters therein contained were not sufficient in law for maintaining the action. Secondly, the common error; and thirdly, that, by the record, it appears that the defendant below was liable to the plaintiff below, upon a covenant implied in law from the language of the second mentioned indenture.

C. R. Turner for plaintiff in error.—The defendant in error is lessee of a term of years, and assigned over his

term to the plaintiff in error; and the point for argument is, whether the plaintiff in error is liable to pay to the defendant in error a half year's rent, which the defendant in error, as lessee, has paid to *Easthope*, his lessor; but which rent did not accrue until after the plaintiff in error had assigned over his estate and interest in the demised premises to *Foley*. The plaintiff in error is not liable, unless, in the assignment from the defendant in error to him, there was an express covenant on the part of the plaintiff in error to pay the rent during the whole of the unexpired term, or to indemnify the defendant in error therefrom; for, unless the plaintiff in error so covenanted, his liability ceased when he assigned over the term. *Taylor v. Shaw* (a). The cases of *Valliant v. Dodemede* (b), *Pitchu v. Stovey* (c), and *Odell v. Water* (d), are also authorities to the same effect. The assignment in this case does not contain any distinct, separate, unequivocal covenant on the part of the plaintiff in error to pay the rent; but it is said, that an express covenant on his part to do so is created by the words, "*subject nevertheless to the payment of the yearly rent, and to the performance of the covenants and agreements reserved and contained in the said indenture of lease,*" which are to be found in the assignment. Now, these words may not import a covenant at all, or, at the utmost, they amount only to an implied covenant or covenant in law, as to which it is sufficient to observe, that such a covenant is inapplicable to the present case, inasmuch as it arises only where there is privity of estate; 1 *Sid.* 447; *Sir W. Jones*, 223; *Bacheloure v. Gage*, *Dyer's Rep.* 257; *Swan v. Stransham*; and there never was any privity of estate between the plaintiff in error and the defendant in error; for, as soon as the defendant in error assigned over

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(a) 1 Bos. & Pull. 21.

(b) 2 Atk. 546.

(c) 4 Mod. 71.

(d) 3 Camp. 394.

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his term to the plaintiff in error, the estate of the former was gone; and, until he did so, there was no estate in the plaintiff in error. Upon the execution of the assignment, the privity of estate, which, up to that moment, had existed between the lessor and the defendant in error, ceased to exist between them, and commenced to exist between the lessor and the plaintiff in error. The question then is, whether the words relied upon amount to an express covenant on the part of the plaintiff in error; and, in considering that question, it is material to observe in what part of the assignment the words are found. Now, they are found in and constitute part of the *habendum*; and the office of the *habendum* is (as stated in *Vin. Abr. tit. Grants, I. a*) "to limit the estate, so that the general implication of the estate which will pass by construction of law by the premises, is always controlled and qualified by the *habendum*." That such is the office of the *habendum*, also appears by *Co. Litt. 183. a.*, where it is said, "If in the premises lands be letten, or a rent granted, the general intendment is, that an estate for life passeth; but, if the *habendum* limit the same for years or at will, the *habendum* doth qualify the general intendment of the premises; and the reason of this is, for that it is a maxim in law that every man's grant shall be taken by construction of law most forcible against himself." As then the grant is the grant of the grantor, so, the words of the *habendum*, which limits, controls, and qualifies the general implication of the estate granted, are also his words; and, as the words relied upon as creating the covenant are part of the *habendum*, it is clear that they were not meant or used as words of agreement or covenant, but as words of qualification only—as words denoting that the assignor did not intend to assign a term free from charge, but subject to certain charges, viz. to the charges created towards the lessor by the original lease. Suppose *A.* to have a lease which he

assigns to *B.* by way of mortgage, he would assign it subject to the rent reserved in the lease; but it would defeat the object of the parties to say, that *B.*, the mortgagee, by so taking the assignment, would covenant with *A.*, the mortgagor, to pay the rent during the term of the lease, and that he would be liable to *A.* in an action of covenant for any rent which *A.* might pay to his lessor subsequently to the assignment. Or, suppose again, that *A.*, having an estate in fee, mortgages it for 1000*l.* to *B.*, and afterwards sells the equity of redemption, or makes a second mortgage to *C.* for 500*l.*; in the conveyance of the equity of redemption, or in the second mortgage, the *habendum* would be to *C.* and his heirs, subject nevertheless to the mortgage to *B.*; but could it be said that a covenant would be created from *C.* to *A.* by the words subject, &c., to pay off *B.*'s mortgage? and other cases might be put in which it would be quite inconsistent with the intention of parties, and with reason or justice, to hold that words like those relied upon create a covenant.

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True it is, that any words in a deed which shew an agreement to do a thing, create a covenant (*a*); but there must be words of agreement, as is shewn in the following case in *Rolle's Abridgment* (*b*). "If lessee for years covenant to repair: Provided always, *and it is agreed*, that the lessor shall find great timber, &c.; this shall make a covenant on the part of the lessor to find great timber, by the word *agreed*, and shall not be a qualification of the covenant of the lessee. But if the lessee covenant to repair: Provided always, that the lessor shall find great timber, without the word *agreed*; this proviso shall not be any covenant on the part of the lessor, but shall only be a qua-

(*a*) Com. Dig. tit. Cov. A. 2; Selwyn's N. P. tit. Cov. S. 3.

(*b*) Tit. Cov. C. 52 & 53.

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lication of the covenant of the lessee." Now, the latter words shew clearly that it was intended that the lessor should find rough timber; but from want of the word agreed, the words were held not to amount to a covenant. In the present case, the Court is left to hunt through the deed for words from which a covenant may be inferred. Now, where a party seeks to bind another by a covenant in a formal instrument, it is his duty to insert it in that instrument in distinct and intelligible terms, by which the party to be bound cannot be deceived; and a covenant ought not to be raised against him from words which are at best equivocal, and which he may never have meant to use in the sense ascribed to them by the other party, nor ought the Court to be called upon to infer a covenant under such circumstances. In *Staines v. Morris* (a), Lord Eldon cannot have thought that the words in question created an express covenant. There the original lease was to *Clarke*, who by deed poll assigned to Sir *William Staines* for the remainder of the term. Upon the death of *Staines*, his executors put up the lease for sale by auction, with a notice that they would not covenant for the title. The lease was purchased by *Morris*, the defendant in the suit; and notwithstanding the notice given by the executors, *Morris's* solicitor inserted in the draft assignment covenants for title on the part of the executors; also inserting an express covenant by *Morris* to pay the rent, and perform the covenants in and by the original lease reserved and contained for the remainder of the term. The draft so prepared was sent to the solicitor for the executors, who first returned it to *Morris's* solicitor, having struck out all the covenants for title except one—that the executors had done no act to incumber; but having left standing *Morris's* covenant

(a) 1 Ves. & Bea. 8.

to pay the future rent, and perform the covenants during the remainder of the term. *Morris's* solicitor afterwards sent the ingrossment to the solicitor for the executors, omitting the covenant of *Morris* to pay the future rent and perform the covenants, but not communicating that he had done so. The solicitor for the executors, however, remarked the omission, and returned the ingrossment and draft, insisting that the latter covenant should be restored; and *Morris's* solicitor afterwards tendered the deed for execution as it stood, without that covenant; and the executors refused to execute it, and filed a bill for specific performance. And the only question in the suit was, whether *Morris* was bound to enter into the covenant to pay the future rent and perform the covenants of the lease for the remainder of the term. Upon the hearing of the cause, a specific performance was decreed, and it was referred to the Master to settle a proper assignment. The Master stated, that the assignment tendered by *Morris* to the executors was a proper assignment. He reported, therefore, in favour of the omission of the covenant there contended for. An exception was then taken to the report by the executors, and that exception was allowed by Lord *Eldon*; and in that case Lord *Eldon* referring to the sale by *Clarke*, the original lessee to Sir *William Staines*, says, "suppose, instead of an assignment actually executed by *Clarke*, the original lessee to Sir *William Staines*, the question had occurred upon an agreement between them for the purchase and assignment of the term, and a bill filed for the execution of that agreement." And then, after adverting to the different liabilities of a lessee and assignee, he says, "if, therefore, this stood upon agreement, the proper execution of such an agreement would be an assignment by *Clarke*, covenanting for the title; and Sir *William Staines*, on the other hand, entering into those covenants implied and expressed, which are intended on

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his part to be executed, where they are both expressed and implied—an assignment not only subject to payment of rent and performance of the covenants, *but the instrument executed and accepted by him, containing an express covenant to pay the rent and perform the covenants.*" Now, in *Staines v. Morris*, the words here relied upon as raising an express covenant, were in the assignment all the way through; the propriety of their insertion had never been disputed; but the language of Lord *Eldon* goes a long way to shew that he did not consider them to amount to an express covenant; indeed, if he had done so, he ought to have dismissed the bill, for the suit was then altogether an idle one.

Burnett v. Lynch (a), perhaps, will be relied upon on the other side; but that case is not unfavourable to the plaintiff in error: it is an authority only to shew, that it is the duty of an assignee, so long as he remains assignee, to pay the rent and perform the covenants contained in the lease, a point not disputed here. *Bayley, J.*, speaking of the duty, expressly says, "That duty appears to me to be very accurately stated in the declaration, where it is described as commensurate with the time during which the assignee had an interest in the premises."

Bompas, Serjt., contrà.—This is not a part of the *habendum*; it is more analogous to a *reddendum*. It is the same as if it had been "yielding and paying." They cannot be called the words of the assignor; they are not here the words of the grantor more than the grantee. This is a deed "*inter partes*," and then they are the words of either. It is said that the liability is to continue only whilst the privity of estate continues. The plaintiff below, however, relies on the privity of contract, and that is not de-

(a) 5 B. & C. 589.

terminated by the determination of the privity of estate. The terms "implied and express covenant" have raised some little difficulty. Mr. Justice *Blackstone* says in his Commentaries (a), "The contract may be either express or implied. *Express* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox or ten loads of timber, or to pay a stated price for certain goods. *Implied*, are such as reason and justice dictate, and which the law presumes that every man undertakes to perform." An express contract is that which you gather from the words, as the meaning of the words; an implied, from the situation of the parties, as tenant and landlord. In *Newton v. Osborn* (b) the words "yielding and paying" were held to be an express covenant. *Harpur v. De Burgh* (c) shews that the *reddendum* is a covenant in law, and that it runs with the land. In the present case, the words "subject to the payment of the yearly rent, and the performance of the covenants and agreements reserved and contained in the lease," mean that the assignee shall hold during the term, and be subject during the term to the payment of the rent. It is, therefore, an express covenant. *Burnett v. Lynch* (d) is a strong case to shew that this is an express covenant between the parties. If the assignment had there been by a deed *inter partes*, it would have held an express covenant. If a man by his deed makes a party to understand, that he will pay rent and perform covenants, it amounts to an express covenant. In *Burnett v. Lynch* the assignment was by deed-poll. Mr. Justice *Littledale*, after stating that an action of covenant will lie by the lessee against the lessor on the word *demise* in the lease, says, "but the word *assign* in this deed-poll does not import any contract or covenant on the part of the assignee, but is a mere description of the interest conveyed.

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(a) Vol. 2, p. 443.

(b) Sty. 387.

(c) 2 Lev. 206.

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It is true, that the lessee does not assign the term generally, but that he assigns it subject to the payment of the rents and performance of the covenants. The assignment being by *deed-poll* does not, however, contain any contract on the part of the assignee; and, in order to enable the assignor to maintain covenant against the assignee, there must be a contract under seal by the latter." Is it not to be implied from that, that those words would have been held a sufficient covenant, if the form or kind of the deed had been sufficient. The word "covenant" means merely an agreement under seal. Mr. Justice *Holroyd* says in the same case, "What is the effect of the assignment? The assignee by virtue of it stands in the situation of the lessee, and becomes bound to pay the rent and perform the covenants; by accepting the assignment he states, that he is subject to the rent and the performance of the covenants." A case more strong in favour of the plaintiff below than *Burnett v. Lynch* cannot be imagined, except an express decision on the point.

In *Chancellor v. Poole (a)*, it was held that the assignee of a term, *declared against as such*, is not liable for rent accruing after he has assigned over, though it be stated that the lessor was a party executing the assignment, and agreed thereby that the term, which was determinable at his option, should be absolute. The assignment there was by deed-poll, and the action was covenant for rent by the lessor. Lord *Mansfield* there said, the question is whether the plaintiff is a contracting or merely an assenting party in the deed-poll. *Ashurst, J.*, said, the plaintiff seems to me to have decided against himself; for he has stated this as an assignment. If he had meant to avail himself of it as a contract between himself and the defendant, he should have stated it according to the legal operation, as a demise from the plaintiff to the defendant: and

(a) 2 Doug. 764.

adds, "*there is a covenant by the defendant for paying the rent in the deed-poll, but it is with the lessee.*" The words there were, "the assignee paying the rents and performing the covenants," which are not at all stronger than they are here. If the participle in the one case is held to amount to a covenant, why then the words here must amount to a covenant. That is a case directly in point. As to the other point relied on, that it was necessary to point out in the declaration the particular covenant on which you rely here, there is an averment that the defendant covenanted to pay the rent and perform the covenants, and that is sufficient.

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Turner in reply.—*Chancellor v. Poole* is no authority upon the point *sub judice*; there *Chancellor* had granted a lease to *Burrough*, who assigned his term to *Poole*; and *Chancellor*, for particular reasons appearing in the case, was a party to the assignment: he contended that the assignment operated as a new lease from him to *Poole*, or that, at least, there was an express covenant in the assignment from *Poole* to him for payment of rent. The Court decided against him on both points. Lord *Mansfield*, it must be admitted, observed, that there was a covenant by *Poole* with *Burrough*, the lessee, for paying the rent; but that was not the question in the case; and a case is only to be considered an authority on the point adjudged: besides, the words contained in the assignment, in *Chancellor v. Poole*, are much stronger than the words relied upon here.

Cur. adv. vult.

The judgment of the Court was now delivered by—

DENMAN, C. J.—This case comes before the Court on a writ of error from the Court of *Common Pleas*. It is an ac-

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tion of covenant brought by the defendant in error on an indenture of assignment of a term for years. The declaration states the original lease from the lessor to the defendant in error, for twenty-one years from March, 1820, containing a covenant to pay rent quarterly; and that, by indenture executed by the plaintiff and defendant, the defendant in error assigned to the plaintiff in error, his executors, &c., the said indenture of lease, and the demised premises, and all the estate, right, title, and interest, term of years then to come and unexpired, property, claim, and demand of the defendant in error, by virtue of the said indenture of lease, &c. therein, to have and to hold the said lease, together with the said premises by the same demised, and by the said assignment assigned, to the plaintiff in error, his executors, administrators, and assigns, during all the rest and remainder of the said term of twenty-one years granted by the said indenture of lease then to come and unexpired, *subject nevertheless to the payment of the yearly rent, and the performance of the covenants and agreements reserved and contained in the said indenture of lease*; and that the plaintiff in error accepted the said assignment and entered. The declaration then assigns as a breach, the non-payment of rent due after the assignment, by reason whereof the defendant in error was obliged to pay the amount.

The plaintiff in error pleaded several pleas, on which issue was joined and found against him; and one plea, *viz.* that before the rent became due he assigned over, to which plea there was a demurrer and joinder, on which judgment was given by the Court of *Common Pleas* for the defendant in error. The question in this case is, whether the plaintiff in error is liable to the defendant in error for nonpayment of rent due after he had assigned over; and that depends upon the further question, whether the words “subject nevertheless to the payment of

the yearly rent," &c., amount to a covenant to pay the rent during the whole residue of the unexpired term. If they do, the judgment of the Court below ought to be affirmed; if they do not, it ought to be reversed. We are of opinion that they do not.

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It is fully established that no precise form of words is necessary to constitute a covenant. "Any words in a deed which *shew an agreement* to do a thing make a covenant" (a); but it must be clear that they are meant to operate *as an agreement*, and not merely as words of condition or qualification (b). Are then the words in question meant to be used as words of agreement between the assignor and assignee, or words of qualification to modify and restrain the generality of the words which precede, and to express clearly the intention of the assignor not to assign an absolute term, but a term subject to all the obligations towards the lessor to which it was originally liable? To determine this we must look at the indenture as stated on the record, and observe in what part the words occur: they come after the *habendum*, and constitute part of it; though the indenture contains the language of both parties, in the granting part the words are those of the grantor, which are to be taken most strongly against himself; and, therefore, it was material for him to qualify the grant, that he might not be considered as conveying any greater estate than he really intended: this is properly done in the *habendum*. Its office is to limit the certainty of the estate (c): "it doth qualify the general intendment of the premises; and the reason of this is, for that it is a maxim of law that every man's grant shall be taken by construction of law most forcible against himself" (d). As these expressions, therefore, occur in that part of the deed in

(a) Com. Dig. Covenant, A. 2.

(d) Co. Litt. 183. a.; see also

(b) Com. Dig. Covenant, A. 3;
1 Roll. Abr. 518, 30 and 25.

Hale, 171; *Stukely v. Butler*, Com.
Dig. Fait, E. 9.

(c) Co. Litt. 6. a.

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which they ought to be, if their object was merely to qualify and abridge the generality of the granting part, it is highly probable that they were intended to have that effect only; and some instances were adduced by the learned counsel for the plaintiff in error, where similar words occurring in the same part of the deed could not possibly have any other signification. For example, the assignment of a lease by way of mortgage, and the conveyance of an estate subject to a mortgage or incumbrance, to a second mortgagee, or to a purchaser, where it is impossible that these words could constitute a covenant by the mortgagee to pay the rent in the one case, or by the second mortgagee or purchaser to pay off the mortgage or incumbrance in the other.

It may be said, however, that, in these instances, the context and subject-matter of the instrument lead to the inference that no covenant was intended by these words, but that, in the present case, no such inference arises; and that the same words, in different instruments, may have different meanings. This may be true, but it lies upon the defendant in error to shew affirmatively that the words amount to an agreement with him to pay the rent and perform the covenants; and is there any thing in this indenture which tends to prove that they were meant to be used in any other sense than that which would naturally be attributed to them in the place in which they occur? On the contrary, if the assignor really intended that the assignee should covenant with him to pay the rent and perform every covenant during the term, and thus become liable, not only for his own defaults, but for those of all subsequent assignees—and the assignee really intended also to bind himself to that extent—is it not to be expected that they would have expressed themselves in distinct unambiguous language? especially as it is the usual practice in cases of this kind, where such a liability is intended, for the assignee to enter into a bond or an ex-

press covenant of indemnity with the assignor against the covenant in the original lease. It was a very just remark made by the counsel for the plaintiff in error, that it is the duty of a party who intends to bind another by a covenant in a former formal instrument, to insert it in that instrument, in distinct and intelligible terms, by which the party to be bound cannot be deceived, and not to call upon the Court to infer such a covenant from words which are at least equivocal, and which one party may never have meant to use in the sense ascribed to them by the other. For these reasons, we think that the proper construction of this indenture is, that these are words of qualification, and not of contract; and, if the question were entirely new, we should adopt that construction. We have, however, the authority of the *Court of King's Bench*, in a case which is not reported, the particulars of which have been furnished by my brother, *James Parke*, who was counsel in it—*Mills v. Harris*, *Michaelmas Term*, 1820. It was an action of *assumpsit* by the assignor against the assignee of a lease, who had accepted but not executed the assignment, for not repaying to the assignor the rent which he had been obliged to pay, after the assignee had assigned over. The deed contained similar words to those in this instrument. Lord *Tenterden* nonsuited the plaintiff on the trial at the Sittings before *Michaelmas Term*, 1820. On a motion for a new trial, the Court confirmed his Lordship's decision by refusing a rule, on the ground that these were not words of agreement, but were merely descriptive of the obligations to which the assignee would be liable as between him and the lessor. It remains only to make some observations on the cases relied upon by the defendant in error. That of *Burnett v. Lynch* (a), proceeds upon the ground that, during *the continuance of the interest of the assignee*, there is a duty on his part to pay

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the rent and perform the covenants. *Bayley, J.*, in giving judgment, states, that the duty is commensurate with the time during which the assignee has an interest in the premises. This duty, we think, would arise from the mere relation between the parties, without any such words as those now under consideration; for the effect of the assignment is, that the lessee becomes a surety to the lessor for the assignee, who, as between himself and the lessor is the principal, bound, whilst he is assignee, to pay the rent and perform the covenant running with the estate; and the surety, after paying the debt, or discharging the obligation to which he is liable, has his remedy over against the principal. And he would also, in all probability, have the same remedy over against each subsequent assignee, in respect of breaches committed during the continuance of the interest of each; for the lessee is, in effect, a surety for each of them to the lessor. The case of *Chancellor v. Poole (a)*, was also mentioned, in which Lord *Mansfield* said, "that there was a covenant by the defendant for paying the rent in the deed-poll, but it was with *the lessee*." There, however, the words of the instrument were very different; they were these, "the assignee paying the rent and performing the covenants, and indemnifying the lessee against the same;" which last words were incapable of being construed as qualifying the generality of the granting part, and could have no other effect than an agreement on the part of the assignee with the assignor. For these reasons we think that the judgment of the Court of *Common Pleas* ought to be reversed.

Judgment reversed.

(a) Doug. 767.

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COTTERILL v. DIXON.

MILNER had obtained a rule to change the venue in this case from *Suffolk* to *Lancaster*, on a special affidavit, stating amongst other things that the witnesses all resided in *Lancaster*.

A motion to change the venue on special grounds, ought to be made after plea pleaded.

R. V. Richards shewed cause, and objected that the application being made after plea pleaded was too late.

BAYLEY, B.—That is so, when the application to change the venue is made upon the ordinary affidavit of the cause of action arising in the county of *A.* and not elsewhere. But where an application is made to change the venue on special grounds, it ought to be made after plea pleaded, because, until then, it cannot be known what issue is to be tried.

Rule absolute.

BALMONT v. MORRIS.

R. V. RICHARDS had obtained a rule for setting aside the proceedings on the bail bond on payment of costs.

Though a plaintiff is not bound to declare *de bene esse*; yet, if he do not, he cannot say that he has lost a trial, so as to have the bail bond stand as a security on setting aside proceedings upon the bail bond.

Sir *W. Owen* shewed cause.—The only question is, whether the bail bond is not to stand as a security. If bail had been properly put in, the plaintiff might have tried his cause; and it is no answer to say that he has not declared; because a plaintiff is never bound to declare *de bene esse*.

BAYLEY, B.—Though you are not bound to declare *de bene esse*, yet, if you do not, you cannot say that you have lost trial (a).

Rule absolute, on payment of costs, without the bail bond standing as a security.

(a) See Rule 5, Hil. T. 2 W. 4

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BUTLER v. FORD and LEDGER.

ASSAULT and false imprisonment. Plea, not guilty. At the trial before *Denman*, C. J., at the last Spring Assizes for the county of *Warwick*, the facts of the case appeared to be as follows:—The plaintiff was a butcher in the town of *Leamington*; the defendants, *Ford* and *Ledger*, were constables and watchmen appointed by the commissioners under an act for paving, watching, and improving the town of *Leamington*. On the 21st September, 1832, about the hour of eight in the evening, a disturbance took place at the plaintiff's house, occasioned by the plaintiff quarrelling with and beating an apprentice boy in his service. The boy was heard to utter great cries, and was seen to come out of the house, and endeavour to run away, with his head cut, and bleeding profusely. The plaintiff followed him in a state of great excitement, and attempted to renew the violence, but the boy eventually made his escape. A crowd collected, and the boy having stated that his master had cut him with a knife, a report to this effect prevailed amongst the persons assembled, and reached the ears of the defendants, who came up to the spot as the people were dispersing. The defendants entered the plaintiff's premises, and found him lying on the floor in a back room. They seized the plaintiff, and told him they wanted him; and, according to the evidence

By a local act for paving, lighting, watching, and improving the town of *Leamington*, certain commissioners were appointed; and, by section 11, were authorized to appoint, by writing, a treasurer and clerk, and also all such surveyors, scavengers, rakers, &c. &c., beadle, constables, watchmen and other officers, deputies, or assistants, for the execution of the purposes of the act, as they should from time to time think proper. By section 77, the commissioners were also empowered to appoint such number of able bodied men as they should think proper, to be employed as watchmen during the night-time, and it was enacted, that it should be lawful for such watchmen, and they were thereby required in their respective stations, to apprehend and secure all malefactors, &c. &c., and all suspected persons who should be found wandering or misbehaving themselves during the hours of keeping watch. By section 78, the watchmen were to be sworn in as constables, and were to be invested with the like powers and authorities, &c. &c., as any constables were invested with or enjoyed by law. By section 163, it was enacted, that no action, suit, or information should be commenced against any person or persons for any thing done or to be done under or by virtue of that act, until one calendar month's notice thereof should have been first given in writing to the clerk of the commissioners of the cause of action, nor at any time whatsoever after sufficient satisfaction or tender should have been made to the party aggrieved. The act contained the usual power of pleading the general issue, and giving the special matter in evidence, and the act was to be deemed a public act:—*Held*, first, that the section requiring notice to be given is not confined to acts done, or directed to be done, by the commissioners, but applies to acts done by constables and watchmen. Secondly, that evidence of the defendants acting as constables and watchmen under the commissioners in the town, was *prima facie* sufficient to entitle them to the protection of the above section, without proof of their appointment; and, thirdly, that where the watchmen had reasonable ground of suspicion that felony had been committed by the plaintiff, and went to the plaintiff's house to apprehend him for such felony, but beat him, and used much more violence than was necessary for effecting his apprehension, they were protected by the section requiring notice.

of a shop boy who was present, began to beat the plaintiff in a violent manner with their staves, in consequence of his not immediately accompanying them. They forced him from the back room into the shop, where they were seen by several persons from the street, a crowd having again collected; and, according to the statements of the witnesses, the defendants, on the one hand, continued their violence towards the plaintiff, while he, on the other hand, violently resisted their attempts to remove him. Meanwhile, the mob in the street began to raise a great outcry against the officers, which increased so much, when the latter forced the plaintiff out of his shop into the street, that they gave up the idea of carrying him away, and suffered him to return into his shop. A by-stander, who was called as a witness for the plaintiff, went up to the officers and inquired of them if they had a warrant, to which *Ford* replied they had not, and stated that they had had information that the plaintiff had cut open his apprentice's head with a knife; he added, that they had told the plaintiff that they did not mean to apprehend him if he would engage to remain quietly at home till the next morning, and that they should not have apprehended him if he had not abused them.

On the part of the defendants, a written appointment of *Ford*, as head-constable and watchman, was put in and proved; and it was also proved, that, for a considerable time before the above transaction occurred, both he and the other defendant had acted as constables and watchmen under the commissioners of the town of *Leamington*. By the act under which the defendants derived their authority, viz. 6 *Geo.* 4, for paving, lighting, watching, and improving the town of *Leamington*, certain commissioners were appointed, and, by sect. 11, were authorized to appoint, by writing under their hands, a treasurer and clerk, and also certain other officers therein mentioned, "and also all such surveyors, scavengers, rakers, cleansers,

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water-keepers, lighters of lamps, beadles, *constables*, *watchmen*, and other officer or officers, deputies, or assistants, for the execution of the purposes of the act, as they should from time to time think proper." By sect. 77, the commissioners were also empowered to appoint such number of able-bodied men as they should think proper to be employed as watchmen during the night-time, and to provide proper watch-houses for the safe custody of persons apprehended by such watchmen while on duty: and to discharge and fine watchmen for neglect of duty. And it was enacted, that "it should be lawful for such watchmen, and they were thereby required, in their respective stations, to apprehend and secure all malefactors, rogues, vagabonds, and disorderly persons, and disturbers of the public peace, and all suspected persons who should be found wandering or misbehaving themselves during the hours of keeping watch, and to conduct all such persons, as soon as conveniently might be, before some justice of the peace." By sect. 78, the watchmen were to be sworn in as constables, and were to be invested with the like powers and authorities, privileges and immunities, as any constables were invested with or enjoyed by law. By sect. 81, two justices of the peace were empowered to punish watchmen by imprisonment for neglect or misconduct. By section 163, it was enacted that no "action, suit, or information, should be commenced against any person or persons *for any thing done or to be done, under or by virtue of that act*, until one calendar month's notice thereof should have been first given in writing to the clerk of the commissioners of the cause and intention of, for, and concerning such action or suit; nor at any time whatsoever, after sufficient satisfaction or tender should have been made to the party aggrieved." It was also provided by the same section that the general issue might be pleaded in any such action, and the act and special matter given in evidence; and that the matter

or thing for which such action, &c. should be so brought was done in pursuance and by the authority of the act. It was also declared that the act should be deemed a public act.

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Upon the above provisions it was contended that the plaintiff ought to be nonsuited, in consequence of his having omitted to give the notice of action required by the 163rd section. And, on the other hand, it was objected by the plaintiff that the defendant *Ledger*, at all events, could not claim the benefit of the provisions of the act, without his appointment being put in and proved; proof of acting in the character of constable or watchman being insufficient. *Denman*, C. J., left three questions to the jury, viz.—1st. Whether the defendants had reasonable grounds for suspecting that a felony had been committed? 2ndly. Whether they went to the plaintiff's house in order to apprehend him for such felony? and, 3rdly, whether they used more violence than was necessary for effecting such apprehension. The jury found in the affirmative, as to the first two questions; and, as to the third, they found that the defendants had used much more violence than was necessary, and gave the plaintiff 50*l.* damages, leave being given to the defendants to move to enter a nonsuit. A rule for this purpose having been obtained in last *Easter* term—

Goulburn, Serjt., and *Humfrey* now shewed cause.—Notice of action was unnecessary: the 163rd section was intended to apply to acts expressly directed by the statute or by the commissioners themselves; but not to acts done by subordinate officers under a general authority derived from the statute or the commissioners. It is reasonable that the commissioners themselves should be protected; but if it be held, that the present defendants are entitled to notice, it will follow that the lowest servants of the commissioners, such as lamplighters and scavengers, will all

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be entitled to the same privilege, which appears very unreasonable and inconvenient. [Lord *Lyndhurst*.—Section 77 of the act expressly directs the watchmen to apprehend malefactors and suspected persons misbehaving themselves]. The defendants did not act upon this occasion as watchmen, but as constables: if they had been patrolling the streets as watchmen, and had seen the disturbance, it might have been different; but they did not come up until the first disturbance was over and the people had dispersed. *Secondly*. Admitting that notice is necessary with regard to the acts of watchmen and constables, it can only be required in cases where the conduct of the officers has been of such a description that they might reasonably suppose they were warranted by the statute in acting as they did. *Cook v. Leonard, per Bayley, J. (a)*. Here the whole conduct of the officers was such that they could have had no reasonable ground for believing that they were acting in pursuance of the act; for, according to the evidence of the boy, they began to beat the plaintiff before he had used any violence in resisting; and, according to their own statement made at the time, they apprehended the plaintiff, not on the ground of his having committed a felony, but because he abused them. There was no colour for supposing that this conduct was warranted by the act; and if that be so, they are not entitled to notice. *Morgan v. Palmer (b)*; *Irving v. Wilson (c)*. [*Bayley, B.*—In those cases there was no colour for supposing that any part of the act complained of was warranted; but here the original apprehension was lawful.] When part of an act is lawful, but the defendant by mistake or inadvertence exceeds his authority, notice ought to be given—*Per Lord Kenyon, Greenway v. Hurd (d)*; but here the excess was not by mistake or inadvertence, but was entirely wanton;

(a) 6 B. & C. 351, 5, 6.

(b) 2 B. & C. 729.

(c) 4 T. R. 485.

(d) 4 T. R. 555.

for beating is no part of the duty of an officer. An action may be maintained for the beating, though not for the seizure; and here the jury have given damages for the excess alone. *Thirdly*. At all events the protection is confined to the defendant *Ford*, and the plaintiff will be entitled to retain his verdict against the other defendant. By section 11, the appointment of constables and watchmen is required to be made in writing, and no such appointment was proved as to the defendant *Ledger*; the only evidence being that he had acted as constable and watchman. Now evidence of acting may be sufficient in the case of ordinary officers known to the law, but not in the case of officers deriving a special authority from a local act, and claiming exclusive privileges by virtue of their offices. Such parties ought to bring themselves clearly within the act; but mere evidence of acting is of an equivocal nature, for the party might be an ordinary constable, acting within the limits of the local act, but not deriving his authority from the commissioners. [Lord *Lyndhurst*.—The act is a public act, and the officers acting under it are well known in the place where the transaction occurred. In *Berryman v. Wise* (a), it is laid down, that, in the case of all peace-officers, constables, &c., it is sufficient to prove that they acted in those characters, without producing their appointments. *Buller, J.*, referred to *Gordon's case* (b), where all the Judges held, that proof of acting was sufficient in an indictment for the murder of an officer in the execution of his duty.

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Adams, Serjt., and *Hayes*, in support of the rule, were directed to confine themselves to the *first* and *second* points. *First*. Watchmen and constables are clearly entitled to the benefit of the 136th section, which extends

(a) 4 T. R. 366.

(b) *Leach, Cro. Ca.* 585.

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to actions against "any persons for any thing done under or by virtue of the act." They derive their whole authority from the act; and section 77 expressly requires watchmen to arrest "malefactors, disturbers of the public peace, and suspected persons wandering or misbehaving themselves during the hours of keeping watch." Now the transaction which gave rise to the apprehension of the plaintiff occurred during the hours of keeping watch, and the jury have found that there was reasonable ground for suspecting the plaintiff had committed a felony: it is, therefore, plain that the words of the above section expressly authorized the defendants to apprehend him. If they had neglected to do so, under the circumstances of the case, they would have been liable to punishment for a neglect of duty, under sections 77 and 78; and it would be very unreasonable to say, that they would have been liable to punishment under these sections for neglecting their duty, and not entitled to the protection given by section 163, for attempting to perform it. No authority can be produced in support of the argument, that a provision of this description is confined to the acts of the commissioners themselves. Such a limited construction would entirely defeat the object of the clause; for the commissioners scarcely ever act themselves, but always by their officers. *Graves v. Arnold* (a) is directly in point. *Secondly.* If any part of the defendants' conduct was justified by the act, they were entitled to notice; and, according to the finding of the jury, the original apprehension was clearly legal. That apprehension and the subsequent violence form one continuous act; the violent conduct of the defendants being occasioned by the violent resistance of the plaintiff. It is, therefore, the ordinary case of a party engaged in the performance of an act

(a) 3 Camp. 242.

which he was authorized to do, and exceeding his authority; and it is established by many decisions, that in such a case notice of action must be given.

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They were then stopped by the Court.

LORD LYNTHURST, C. B.—I am of opinion that the rule for entering a nonsuit ought to be made absolute. It has been contended, in the first place, that the 163rd section, which requires notice to be given, should be confined to acts done or directed to be done by the commissioners themselves; but the language of the statute does not warrant such a construction. The act says, that “no action, suit, or information shall be commenced against *any person or persons for any thing done or to be done under or by virtue of this act*, until one calendar month’s notice thereof shall be first given in writing to the clerk of the commissioners, signed by the intended plaintiff, of the cause and intention of, for, and concerning such action or suit, nor at any time whatsoever after sufficient satisfaction or tender shall have been made to the party aggrieved.” Nothing can be more general than the words of this section, and there is nothing to justify us in giving them a limited construction. The object of the clause is to enable the commissioners to tender amends for the acts of their officers where the circumstances of the case appear to render such a course proper, and this object would be defeated by the limited construction contended for on the part of the plaintiff. If an authority were wanting on this point, *Graves v. Arnold* is directly applicable. Upon the question raised as to the evidence offered at the trial to establish that the defendants were constables and watchmen, I think it was sufficient to prove that they acted in those characters. Evidence of this nature is evidence that they were duly appointed; it is not conclusive, but quite sufficient as a *prima facie* case. Upon the remaining question, namely,

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whether the conduct of the defendants was of such a description as to enable them to avail themselves of the provision of the statute relative to notice of action, the facts of the case are, that the officers had reasonable ground for apprehending the plaintiff; that they attempted to apprehend him, and that, upon his resistance, they were guilty of an excess in endeavouring to effect his apprehension. But where officers are in the execution of their duty and are guilty of an excess, this is just the case which the statute was intended to meet; for the enactment which enables the commissioners to tender amends would be useless in cases where the officers had acted within the strict line of their duty.

BAYLEY, B.—It is quite clear that the 163rd section is not confined to acts done by the commissioners themselves: if any party is doing an act which the statute authorizes, he is acting under and by virtue of the act. Upon the question of excess, you must not look to insulated parts of the transaction, but to the whole of it. Here there was evidence that the plaintiff had grossly misconducted himself to a boy in his service, and the circumstance of the case raised a suspicion that he had been guilty of a felonious cutting and wounding; the jury found that there was reasonable ground for such a suspicion, and that the defendants went to apprehend the plaintiff, but committed unnecessary violence in effecting his apprehension. Upon a view of the whole evidence, it appears that the defendants were engaged in doing an act authorized by the statute, but went beyond their duty, and this is precisely the case for a notice of action. The cases cited by the plaintiff's counsel are plainly distinguishable. In *Cook v. Leonard* there was no reasonable ground for supposing that any part of the act done was authorized by the statute; and in *Morgan v. Palmer* and *Irving v. Wilson*, there was no colour for supposing that

the defendants were entitled to exact the money in virtue of their respective offices. Upon the last point, I think, that, even if strict proof of appointment were necessary, it was enough to prove the appointment of one, and that the other would also be entitled to notice, as acting in his aid. But, besides this, the general rule is well established, that evidence of acting is sufficient *prima facie* proof of appointment; and no distinction can be supported between peace-officers appointed under a local act and other peace-officers.

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VAUGHAN, B.—I am of the same opinion upon all the points. The case, on the part of the plaintiff, has been argued as if the violence complained of were an insulated act, standing perfectly distinct from all the other circumstances of the case; but it is not so, the arrest and subsequent violence, are parts of the same transaction; and the violence proved to have been committed by the defendants is only evidence that they were guilty of an excess. *Greenway v. Hurd* (a) shews, that, when parties have committed an excess in the performance of a lawful act, they are within the scope of legislative provisions, resembling that contained in the 163rd section of the act now before us; and *Weller v. Toke* (b) is a strong authority to shew that such provisions are expressly intended to apply to cases where the party claiming to be entitled to notice has been a wrong-doer. It seems to me, from the whole evidence, that the present case is within the very words of the act, as well as within its spirit and meaning.

BOLLAND, B.—I am also of the same opinion. Upon the first point, I think the very general language of the 163rd section manifestly shews that it was intended to apply to all parties acting under the statute. I also think that the

(a) 4 T. R. 553.

(b) 9 East, 364.

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evidence of acting was sufficient proof of appointment; and that here the evidence was decisive to shew that the defendants had acted in the particular characters, by virtue of which they claimed to be entitled to notice. Upon the remaining point, I am of opinion that the plaintiff cannot separate the alleged excess from the original apprehension, and claim to maintain the present action in respect of such excess alone. The argument for the plaintiff, upon this point, would go to the extent of proving that notice was never necessary, except in cases where it could not be wanted; for the plaintiff, in an action like the present, might always wait the event of a trial, and, if he succeeded in establishing that any excess had been committed by the defendant, he would say that his action was brought only in respect of such excess, and not for the original apprehension. This would also impose great hardship upon officers in the execution of their duty; for it might often happen that a party who had been apprehended, and had violently resisted the officer effecting his apprehension, would be able to prove that the officer had used considerable violence, while the latter might be without the means of shewing that the plaintiff's conduct had rendered such violence absolutely necessary.

Rule absolute.

SANDLAND v. CLARIDGE.

A sci. fa. against bail may be tested *after* the return day of the *ca. sa.* against the principal.

The four days during which a *sci. fa.* against bail must lie in the sheriff's office need not be in term.

SCIRE facias against bail. The *ca. sa.* against the principal in the original action was returnable on the 4th of *May*. The *sci. fa.* was tested on the 8th of *May*, being the last day of *Easter* term, was returnable on the 25th of *May*, and was lodged with the sheriff of *Middlesex* on the 13th of *May*, and the bail were duly summoned.

John Jervis now moved, upon notice, to set aside the

writ of *sci. fa.*, and all proceedings thereon, for irregularity.

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The writ of *sci. fa.* is irregular, in not being tested on the return day of the writ. In *Tidd's Practice* (a), it is laid down that "the *sci. fa.*, upon a recognizance against bail in the action, when the proceedings are by bill, ought to be tested on the return day, or, by original in the *King's Bench* or *Common Pleas*, on the *quarto die post* of the return of the *capias ad satisfaciendum* against the principal." So, in *Dax's Practice* (b) it is said, that "it should be tested on the return day of the *ca. sa.*"

The proceedings are also irregular, as the writ of *sci. fa.* was not left four clear days *in term* at the sheriff's office. In *Dax's Practice* (c) it is said, "it must be left in the sheriff's office the last four clear days, exclusive of the day it is lodged and of the return day, and exclusive of *Sundays*, before the return thereof." The rule is laid down in the same way in *Tidd's Practice* (d).

Crompton shewed cause in the first instance.—There is no authority for saying that the four days, during which the writ is to lie in the sheriff's office, are to be in term. The books of practice which have been cited lay down the rule with great particularity, but they say the last four clear days before the return, and do not say four days in term. [*Bayley, B.*—If the *sci. fa.* be returnable, as it may be, on the first day of term, how could the four last days exclusive before the return, during which the writ is to lie in the office, be *in term*?] As to the teste of the *sci. fa.*, all the authorities and cases shew merely that the *sci. fa.* cannot be tested *before* the return of the *ca. sa.* It may be tested either on the return day, or after the return day, that is, after the cause of action has accrued, and

(a) 1175, 8th edit.

(c) 1st edit. 123.

(b) *Ibid.*

(d) 8th edit. 1179.

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not before. It is an action upon a judgment; and there is nothing to compel a party who has a cause of action, to sue out his writ the very day the cause of action accrues, whether he proceeds by *sci. fa.* or by action of debt.

The contest in the cases has always been, as to whether the *sci. fa.* could be sued out on the return day, not whether it must be sued out on that day. *Stewart v. Smith* (a); *Shivers v. Brooks* (b). The Courts have held that the writ might be tested on that day, because the cause of action had then accrued; but this is the first case in which the bail have said that the *sci. fa.* was sued out too late.

John Jervis, in support of the rule, relied on the authorities in the books of practice mentioned by him in moving for the rule, and upon the uniform practice, and he referred to the officers of the Court.

LORD LYNTHURST, C. B.—The Master states to us, that it is usual that the writ of *sci. fa.* should be tested on the return day of the *ca. sa.*; but he does not state that it is necessary that it should be so tested; the authorities shew that it *may* be tested on the return day, not that it *must*. The rule must be discharged.

Rule discharged, with costs.

(a) 2 Ld. Raym. 1567; *Strange*, (b) 8 T. R. 628.
866, S. C.

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WILLIAMS v. STOTT.

SLANDER. The declaration began by alleging, that, before the time of the committing the grievances therein-after mentioned, the plaintiff was employed as the servant of certain persons, to wit, the mayor, aldermen, and burgesses of the borough of *Warwick*; in a certain situation, office, and employment, to wit, the situation, office, and employment of one of the chamberlains of the commons and commonable lands, within the parish of *St. Mary*, in the borough of *Warwick*; by virtue and in exercise of which said employment, it was the plaintiff's duty to receive and take into his possession divers large sums of money, for and on account of the said mayor, aldermen, and burgesses. And that the defendant, contriving to injure the plaintiff, and to cause it to be suspected that he had been and was guilty of the offence of fraudulent and *felonious embezzlement*, and to subject him to the penalties provided by the laws against persons guilty thereof, in &c., at &c., in a discourse which the defendant had of and concerning the plaintiff, as such servant of the said mayor, aldermen, and burgesses, and of and concerning the plaintiff's conduct in his said employment, in the presence, &c., spoke and published to and of and concerning the plaintiff, and of and concerning the conduct of the plaintiff as such servant as aforesaid, the false and defamatory words following, viz.: "You are a rogue and a villain; and what have you (meaning the said plaintiff) done with the commoners' money? (thereby meaning money received by the plaintiff by virtue of his said employment). You (meaning the plaintiff) embezzled!" (thereby meaning that the plaintiff had fraudulently and feloniously, and

Slander, for accusing plaintiff of felonious embezzlement.

It appeared that the plaintiff had been chosen and sworn in at a court leet held by a corporation, as chamberlain of certain commonable lands. The duties of the chamberlain (who received no remuneration) were to collect monies from the commoners and other persons using the commonable lands; to employ the monies so received in keeping the lands in order; to account at the end of the year to two aldermen of the corporation, and to pay over any balance in his hands to his successors in office:—*Held*, that the plaintiff was not "a servant, or person employed in the capacity of a servant," within the 7 & 8 Geo. 4, c. 29, s. 47, as to embezzlement.

If a good innuendo in a declaration, ascribing a particular meaning to alleged slanderous words, be not supported in evidence, the plaintiff cannot reject it at the trial, and resort to another meaning.

Semble, that a verbal imputation of fraudulent embezzlement in an office of the above description would not be actionable.

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against the form of the statute in that behalf made and provided, embezzled money received by him by virtue of his said employment). There were other words of general abuse set out in the count, which it is unnecessary to mention. The second count was similar to the first, referring to the prefatory matter stated in that count, and containing a similar innuendo. The third count set out the same words, but alleged that they were spoken of and concerning the plaintiff as servant to certain persons, to wit, the commoners of the parish of *St. Mary*, in the borough of *Warwick*, in a certain employment, to wit, &c., describing the employment as in the first count, but stating that the monies were received for and on account of the commoners, with a like innuendo as to felonious embezzlement. The fourth count alleged that the words were spoken of and concerning the plaintiff, and of and concerning his conduct in a certain employment, to wit, the employment, situation, and office of one of the chamberlains of the commons and commonable lands of the parish of *St. Mary*, without averring that he was servant to any parties, but containing a similar innuendo. The last count did not refer to any office, but merely set out the words with an innuendo that the defendant meant that the plaintiff had been guilty of fraudulent and felonious embezzlement. Plea—Not guilty.

At the trial before *Denman, C. J.*, at the last Spring Assizes for the county of *Warwick*, it appeared in evidence that there were commonable lands, of considerable extent, attached to the borough of *Warwick*, and that the plaintiff filled the situation of one of the chamberlains of the commons of the parish of *St. Mary*. The chamberlains, four in number, were annually nominated by the leet jury, at a court leet held by the mayor, aldermen, and burgesses of *Warwick*. The steward of the leet, by whom the court was held, was the town clerk of the corporation, who swore in the chamberlains when chosen. The duties of the office consisted in superintending certain lands, upon

which various persons inhabiting the parish of *St. Mary* had rights of common; the chamberlains collected certain sums from the commoners in respect of the number of commonable cattle turned upon the lands by each individual; and they also collected monies from persons making use of the commonable lands at races and reviews, which were usually held therein. The monies thus collected they applied in fencing, soughing, draining, and otherwise keeping the lands in order; and, at the expiration of their year of office, they passed their accounts before two of the aldermen of the corporation, who were also justices in the borough; and, if any balance remained in their hands, they paid it over to their successors in office. Upon this evidence, it was objected by the defendant's counsel that the plaintiff was not a servant, or person employed in the capacity of a servant, within the meaning of the statute 7 & 8 *Geo. 4*, c. 29, s. 47, the present legislative provision as to embezzlement by clerks or servants; and that, as there was an innuendo to each of the counts, averring that the defendant meant to impute to the plaintiff the offence of embezzlement against the form of the statute, the plaintiff ought to be nonsuited. The Lord Chief Justice reserved the point, and the jury found a verdict for the plaintiff. In *Easter Term* last, *Hill* obtained a rule *nisi*, to shew cause why a nonsuit should not be entered, and relied on the words of the above statute (a), and cited *Smith v. Carey* (b).

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(a) "If any clerk or servant, or person employed for the purpose or in the capacity of a clerk or servant, shall, by virtue of such employment, receive, or take into his possession, any chattel, money, or valuable security, for, or in the name, or on the account of his master, and shall fraudulently embezzle the same, or any part thereof, every such of-

fender shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security, was not received into the possession of such master, otherwise than by the actual possession of his clerk, servant, or other person so employed."

(b) 3 Camp. 461.

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Goulburn, Serjt., and Hayes, now shewed cause.—First. The plaintiff was a servant, or person employed in the capacity of a servant, to the corporation of *Warwick*, and was therefore within the 7 & 8 *Geo.* 4, c. 29, s. 47. The words of that statute are sufficiently comprehensive to embrace the servant of corporations. The former statute, 39 *Geo.* 3, c. 85, expressly mentions servants, or persons employed in that capacity, “to any body corporate or politic,” and it is obvious that these words were omitted in the recent statute only for the sake of brevity. Here the corporation were lords of the leet, at the court of which the plaintiff was appointed. The court was held by the town clerk, and it appeared that various other officers of the corporation were appointed at the same time and in the same manner. The duties of the office were those of an ordinary bailiff or steward, and were confined to the superintendence of a certain part of the corporation lands; and, at the end of the year, the chamberlains passed their accounts before two aldermen of the corporation. The whole of the evidence taken together shews that the plaintiff was substantially a servant of the corporation. It will be objected that he was not a servant but an officer; but, if he is to be excluded from the operation of the statute on this ground, the same consequence will follow in the case of the majority of the servants of corporations. He is not the less a servant for being an officer. [*Bolland, B.*—Some years ago a person, who held a situation under the trustees of *Greenwich Hospital*, and who had embezzled to a great amount, was indicted, and Mr. Justice *Burroughs*, before whom he was tried, after much consideration held, that the prisoner did not come within the statute, on the ground of his being a sworn officer, and not an ordinary servant. It appears, in the present case, that the plaintiff was also sworn in.] Much might depend in that case upon the precise nature of the employment, and on the framing of the indictment; but, even admitting

it to be an authority in point, the ruling of the learned Judge can hardly be considered as decisive of the question. And it appears a strong proposition that a man employed to do acts of service for others should cease to be a servant, because he bound himself by an oath to perform his service faithfully. The statute refers to the nature of the employment, not the mode of appointment; and there are several cases which shew that it is not confined to ordinary clerks and servants. In *R. v. Squire* (a), the accountant and treasurer to overseers of a township was held within the late statute. In *R. v. Tyers* (b), a person who was clerk to parish officers at a salary voted in vestry, was indicted, and no question raised as to the nature of his employment. In *Beacall's* case (c), the steward of the guardians and directors of the poor of parishes, incorporated by an act of parliament, which created the office of steward, and directed the mode of appointment, was indicted, and no point taken as to his not being an object of the statute. In *R. v. Burton* (d), a parish clerk, who had collected and embezzled the sacrament money, was held not within the act; but there it did not appear that he collected the money, either by virtue of his office, or by the directions of the minister or churchwardens; and the money was received for purposes of charity.

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Secondly. The plaintiff may rely on the fourth count, which does not allege that he was servant to any one. The innuendo as to felonious embezzlement may be rejected; and the words will be actionable without the aid of the innuendo, as amounting to slander of the plaintiff in his office. An innuendo may always be rejected where there is a sufficient cause of action without it; and, in the present case, the innuendo was wholly unnecessary, since it does not refer to any previously ascertained facts, but merely states the supposed meaning of the slander, which mean-

(a) *Russ. & Ry. Cro. Ca.* 349.

(b) *Ibid.* 402.

(c) *1 Ry. & Mo. Cro. Ca.* 15.

(d) *Ibid.* 237.

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ing the Court would collect without any innuendo. It is also an established principle, that the plaintiff, in any action of *tort*, may recover upon proof of a part only of the cause of action stated in his declaration, provided such part be in itself sufficient to form the subject of an action. In *Corbett v. Hill* (a), it was held that an innuendo might be rejected where the words were actionable without any innuendo. *Smith v. Cooker* (b), was a similar decision. In *Roberts v. Camden* (c), an innuendo, not warranted by any preceding colloquium, was rejected. In *Harvey v. French* (d), an innuendo, improperly enlarging the sense of a libel, was rejected, on a writ of error, after verdict for the plaintiff. [Bayley, B.—That was a bad innuendo. Have you any authority to shew that where there is a good and valid innuendo, which is not supported by proof, you can resort to another meaning, which you have not given to the words?] A much stronger argument applies against the rejection of the innuendo in *Harvey v. French* than in the present case; for it might have been urged that the plaintiff had there recovered damages in respect of the enlarged sense, whereas here the objection arises before the case goes to the jury; and they give damages, not in respect of the enlarged sense stated in the declaration, but in respect of that actually proved by the witnesses. *Smith v. Carey* (e), and *Sellers v. Till* (f), will be relied on by the other side; but the first is only a *nisi prius* decision, and appears imperfectly reported; for the expressions attributed to Lord *Ellenborough* do not appear warranted by the slanderous words themselves. The words are stated to be, that the plaintiff “lived by swindling and robbing the public.” Now a verbal charge of swindling is not actionable; *Saville v.*

(a) Cro. Eliz. 609.

(d) 1 Cr. & M. 1.

(b) 1 Rol. Rep. 84, and Cro. Car.

(e) 3 Camp. 461.

512.

(f) 4 B. & C. 655; 7 D. & R.

(c) 9 East, 93.

121, S. C.]

Jardine (a); and "robbing the public" is a loose general expression, which clearly does not impute felony, and cannot be actionable *per se* in any other sense. *Sellers v. Till* will be found more fully reported in 7 *Dowl. & Ryl.* 121; and, according to that report, the judgment appears to have proceeded entirely on the ground of the words being only actionable with respect to the plaintiff's character as collector, which situation he failed in proving that he filled. The innuendo being rejected, the count will be good as shewing a slander of the plaintiff in his office; the nature of the office, whether lucrative or merely confidential, is immaterial. In *Strode v. Hornes* (b), slander of a churchwarden was held actionable (c).

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Thirdly. The words themselves import a felonious embezzlement; and the plaintiff may, therefore, recover on the fifth count, without any reference to the situation he held, or, at all events, it was a question of fact for the jury whether the defendant did or did not mean to impute this offence to the plaintiff. Slandorous words are to be construed in their ordinary and popular sense; *Harvey v. French*; and the word "embezzle," in its ordinary sense, imports a felonious embezzlement. It is also fully settled, that a party using slanderous words must be taken to admit every fact which is necessarily to be inferred from the words themselves. And a man cannot commit embezzlement without being in a situation which enables him to do so. On these principles, an action would have been maintainable, even though the plaintiff had held no situation whatever, unless the jury had negatived the intention to impute an indictable offence. And it seems strange that the plaintiff should be deprived of a right of action merely because he holds a situation, in which it may be a nice point of law whether or not a felonious em-

(a) 2 H. Bl. 532.

Stark. Libel, p. 117, *et seq.* 2nd edit.

(b) Styl. 338.

(c) See the cases collected, 1

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bezzlement can be committed. It is not asserted as a fact that the defendant did not mean to impute this offence to the plaintiff; and if such were really his meaning, it appears to be creating a false issue to be arguing whether or not the plaintiff could commit it. Where words are *prima facie* actionable, the *onus* is on the defendant, to shew that they were used in an innocent sense; and the question is one of fact to be determined by the jury. *Cristie v. Cowell* (a); *Penfold v. Westcott* (b). The jury have not found here that the words were used innocently, and, therefore, at all events, the objection is only a ground for a new trial.

Hill and Bourne, in support of the rule.—He must be a servant, or a person in the same situation as a servant, to come within the meaning of the statute. There must be a master, but who is the master here? The plaintiff has no salary, which is an incident of service. He is to account to two aldermen of the corporation, but who is he to pay over the money to?—not to them, but to his successors in office. Besides, he has a right, during the continuance of his office, to retain the money. If he has a right to retain the money at the time, then the misapplication of the money at the time cannot be an embezzlement within the statute. Here, the defendant was appointed by a court leet, not by the corporation of the commoners. [*Bayley, B.*—The cases where a person has been held to be a servant within the act, seem all to be plainly distinguishable from the present. They are cases where the person takes his office immediately from the person who is to have the control over him as master, and where the servant receives money for him, which the master has a right to have paid over to him then. Here, he has a right to retain the money from the corporation during his continuance in office.] The corporation never are entitled to it at any time.

(a) 1 Peake, 4.

(b) 2 Bos. & Pul. N. R. 335.

Secondly. If an innuendo be inserted by ignorance or error, and it is a bad one, it may be rejected from the record. But, we are not considering here, whether the record be good or bad, but whether applying the facts to the record as it stands, it is proved. The defendant is not saying that the declaration is demurrable, but that the facts proved at the trial do not support it. All the cases cited were, either on writs of error or in arrest of judgment, except the case of *Smith v. Carey*, where Lord *Ellenborough* says, "The words were in themselves actionable; and, if there had been no such innuendo as to their meaning, the plaintiff would certainly have been entitled to a verdict; but the plaintiff was bound to shew they were spoken in the sense he ascribed to them." It does not appear that the declaration was bad, but that the facts as applied to that declaration did not support it. In *Sellers v. Till*, the Court says, the plaintiff was bound to prove that the words were applicable to him, in the manner that he had himself pointed out, and for want of such proof was properly nonsuited. Those decisions are directly in point. [Bayley, B.—There is a case which has not been mentioned, *Woolnoth v. Meadows* (a), where it was held, that the meaning of the words must be proved as laid. Lord *Ellenborough*, after stating the innuendo, says, "Now, upon a count so framed, the plaintiff must have gone into other proofs than of the mere speaking of the words; and, he must not only have shewn that the defendant's meaning was to impute a crime of that nature to the plaintiff, but that the words were so understood by the hearers."]

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BAYLEY, B.—I think that the rule in this case ought to be made absolute. It is material to see what allegations are contained in the declaration; for, if there be a failure of proof with regard to any essential allegation, the plain-

(a) 5 East, 469.

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tiff cannot be entitled to recover. The declaration contains five counts, and, at the commencement of the first, there is a prefatory averment which extends to several of the others. The plaintiff states in this averment, that, before and at the time of the committing of the grievances thereafter mentioned, he had been, and was employed as the *servant* of certain persons, to wit, the mayor, aldermen, and burgesses of *Warwick*; in a certain situation, office, and employment, to wit, the situation, office, and employment of one of the chamberlains of the commons and commonable lands within the parish of *St. Mary*, in the borough of *Warwick*; by virtue and in exercise of which employment, it was the duty of the plaintiff to receive and take into his possession, from time to time, divers sums of money, for and on account of the said mayor, aldermen, and burgesses. It is not alleged, that the office or employment of chamberlain is a public office; nor, is the office so described as to enable us to judge whether it is or is not such an office. The declaration then avers, that the defendant, continuing to injure the plaintiff, and to cause it to be suspected and believed that he had been guilty of fraudulent and *felonious embezzlement*, and to subject him to the pains and penalties provided by the laws against persons guilty thereof, in a certain discourse which defendant then and there had of and concerning the plaintiff, *as such servant of the said mayor, aldermen, and burgesses*, and of and concerning the conduct of the said plaintiff in his said employment, spoke and published of and concerning the plaintiff, and of and concerning the plaintiff's conduct as such servant as aforesaid, in his said situation, office, and employment, the words set out in the declaration. And, at the end of the count, there is an innuendo, stating that the defendant meant that the plaintiff had fraudulently, and feloniously, and against the form of the statute in that behalf, embezzled money received by him by virtue of his said employment. The

second count refers to the prefatory matter stated in the first, and contains a similar innuendo. The third count is substantially the same as the first, with this distinction, that the plaintiff is stated to be the servant of the commoners of the parish of *St. Mary*, instead of servant to the mayor, aldermen, and burgesses. All these counts ascribe to the plaintiff the character of servant; they state the alleged slanderous words to have been spoken of the plaintiff as such servant, and they aver the meaning of such words to be that the plaintiff had committed embezzlement, against the form of the statute. It becomes, therefore, material to consider whether a person in the situation of the plaintiff is within the provisions of the statute relating to embezzlement; for, if the statute does not apply to a case of this description, the plaintiff will not be entitled to a verdict upon any of these counts. The statutory provision, applicable to this question, is contained in the 7 & 8 *Geo. 4*, c. 29, s. 47; and, it appears to me, that this provision was intended to embrace persons of a very different description from the plaintiff: the words of the act are, "if any *clerk or servant*, or any person employed for the *purpose, or in the capacity of a clerk or servant*, shall, by virtue of such employment, receive, or &c., for, or in the name, or on the account of, *his master*, and shall fraudulently embezzle the same, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, &c. was not received into the possession of such master, otherwise than by the actual possession of such servant, or other person so employed." From the whole of this provision, it appears to me to have been intended to apply to persons in the ordinary situation of clerks or servants, and having masters to whom they were accountable for the discharge of the duties of their situation. Now, in the present case, is the plaintiff in that situation? and who are his masters? From the evidence, it appears, that he was not nominated

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by the corporation, or the commoners, but was appointed to the post of chamberlain at a court leet. And how can it be said that the corporation or the commoners are his masters, when he does not derive his authority from either? The cases, which have been properly pressed upon our attention by the plaintiff's counsel, are distinguishable from the present upon this ground, viz. that, in all these cases, the party stood in the situation of a plain and ordinary servant to his employers. This observation applies to the cases of *R. v. Squire* (a); *R. v. Tyers* (b); and *Beacall's* case (c). But, in the case of the sacrament money, the party was held not to be within the statute, because he could not be said to be the servant of either the minister or the other parties named in the indictment. In the present case, I think that the plaintiff does not come within the fair meaning of the statute—he is not the servant of another, but fills an office of his own; he does not receive money in the course of his employment as the mere agent of another, but appears to be entitled by virtue of his office to keep the money in his own hands until the end of the year for which he is appointed. For these reasons, I am, therefore, of opinion, that the plaintiff fails in proof as to the first, second, and third counts.

The fourth count is differently framed: it is not stated in that count that the plaintiff is the servant of any one; but that the words were spoken “of and concerning the plaintiff, and of and concerning the conduct of the plaintiff in a certain employment, to wit, the employment, situation, and office of one of the chamberlains of the commons and commonable lands within the parish of *St. Mary* in the borough of *Warwick*,” and there is an innuendo similar to those contained in the preceding counts.

(a) 1 Russ. & Ry. C. C. 349.

(b) Russ. & Ry. 402.

(c) 1 Ry. & Mo. Cr. Cas. 15.

(d) *R. v. Barton*, 1 Ry. & Mo. C. C. 237.

It has been contended that this innuendo may be rejected, and that the plaintiff will then be entitled to a verdict on this count; but the count does not state what the nature of the situation of chamberlain is; and without knowing this, how can the innuendo be rejected? You may reject on demurrer, or on motion in arrest of judgment, an innuendo which is not warranted by the preceding allegations in the declaration; and all the cases which have been cited by the plaintiff's counsel are cases of this description. But the question here is, whether you may reject at the trial an innuendo which is good upon the face of the declaration? By such an innuendo the plaintiff makes it part of his case that the alleged slander bears the peculiar character which he assigns to it; and I know of no instance in which it has been held that you may separate the words themselves from the explanation which the plaintiff has given to them. *Sellers v. Till* (a), *Smith v. Carey* (b), and the dictum of Lord *Ellenborough* in *Woolnoth v. Meadows* (c), lean the other way: these authorities appear to shew that the whole of an innuendo, which is not upon the face of the declaration a bad one, must be proved; they shew that such an innuendo gives a specific character to the libel or slander, which becomes parcel of the issue, and a failure in proof of which will be fatal to the plaintiff's case. Here, it appears to me to be clear from the evidence, that the plaintiff was not within the statute 7 & 8 *Geo.* 4, and therefore I think he failed in proving the innuendo, and, consequently, that he is not entitled to recover on this count. But even if the innuendo could be rejected, I do not think that the plaintiff would be entitled to a verdict. The office of chamberlain is not one of emolument, nor is it one in any manner known to the law; and I am not prepared to say that the charge of *fraudulent* embezzlement applied to

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(a) 4 B. & C. 655.

(b) 3 Camp. 461.

(c) 5 East, 470.

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such a situation would be actionable. The case cited from *Styles* (a) was of a public officer deriving his authority partly by common law and partly by statute. Here it is not shewn that the office is a public office; and, in the absence of such information, I think the charge of fraudulent embezzlement is not sufficient to entitle the plaintiff to recover. The last count of the declaration appears also to be insufficient without proof of the innuendo therein; and, upon these grounds, I am of opinion that the rule for entering a nonsuit must be made absolute.

VAUGHAN, B.—It is important in discussing this question to bear in mind the precise stage of the proceedings at which it arises. This is a rule for entering a nonsuit upon a point raised and reserved at the trial; and we are, consequently, in exactly the same situation as the Judge who tried the cause. If it should appear to us that the objection taken ought to have prevailed at the trial, it must prevail now. Upon the best consideration I have been able to give the circumstances of the case, I think that the objection ought to have prevailed at the trial; and I therefore agree with my brother *Bayley*, that the rule ought to be made absolute. The argument upon the first three counts of the declaration has turned upon the construction of the 47th section of 7 & 8 *Geo. 4*, c. 29, and of the former statute, 39 *Geo. 3*, c. 85, which has been properly referred to in illustration of the existing legislative enactments upon the subject of embezzlement. The 39 *Geo. 3*, c. 85, recites the mischief which the statute was intended to remedy, and then provides against embezzlement “by any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant to any person or persons whomsoever, or to any body corporate or politic.” The subsequent statute omits

(a) *Spode v. Homes*, Styl. 338.

the words "body corporate or politic;" but there can be no doubt that it would be held to embrace persons employed in the capacity of clerks or servants to corporations. The question here is, whether the plaintiff is such a clerk or servant, or person employed in that capacity; and I should say, from the evidence that has been given of the nature of his employment, that he certainly is no servant. If he be a servant, who are his masters? What control have the parties named in the declaration as his masters over him? He receives money by virtue of his office; but it does not appear that any person has a right to demand the money from him when received, but, on the contrary, that he is entitled to retain it in his own hands till the expiration of his year of office. These circumstances shew that the plaintiff is not the servant of another, but an independent officer. With respect to the fourth count, I am also of opinion that the innuendo must be read as a substantive allegation in the declaration, and cannot be rejected. The case of an insensible or repugnant innuendo being rejected as surplusage upon demurrer, or on motion in arrest of judgment, is very different from the present case. We are here upon a question of evidence, not as to the rejection of a bad innuendo, but as to the proof of a good one. It seems to me that the plaintiff, in failing to bring himself within the statute, has omitted to prove a material allegation in the declaration, and that the Judge ought to have nonsuited him at the trial; and I therefore think, as we are placed upon this rule in the same situation as the learned Judge, the rule ought to be made absolute.

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GURNEY, B., concurred.

Rule absolute.

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The ARCHBISHOP OF CANTERBURY v. ROBERTSON.

Where an administrator having obtained possession of the intestate's effects, converted a sum of 10,875*l.* 8*s.* 9*d.* to his own use, and subsequently became bankrupt, before he had exhibited an inventory, or delivered in his account, pursuant to the condition of the administration bond, and before any decree of the Ecclesiastical Court to pay over the residue to the next of kin:—*Held*, that the conversion by the administrator of the intestate's effects to his own use, so that they were entirely lost to the estate, was a breach of the condition of the bond, "well and truly to administer the goods of the intestate according to law;" and that, in an action brought at the instance of the next of kin in the name of the Ordinary, the surety in the administration bond was liable for the full amount of the money so misapplied.

DEBT on a joint and several bond, bearing date the 31st of *May*, 1830, in the penal sum of 50,000*l.*, in which his Grace the Archbishop of *Canterbury* was the obligee, and the defendant, and one *John Henry Skelton*, and *John Skelton*, deceased, were the obligors. The defendant pleaded *non est factum*; upon which the plaintiff joined issue, and then craved *oyer* of the bond and condition, and suggested four breaches on the record. The condition was as follows: that, if *John Henry Skelton*, the natural and lawful father, and the curator or guardian, lawfully assigned to *John Henry Skelton*, *Jonathan Schweitzer Skelton*, *Mary Anne Skelton*, spinster, and *Lucy Skelton*, spinster, minors, the lawful nephews and nieces of *Charles Frederick Schweitzer*, deceased, and administrator of all and singular the goods, chattels, and credits of the said deceased, for the use and benefit of the said minors, and until one of them should attain the age of twenty-one years, did make or cause to be made a true and perfect inventory of all and singular the goods, chattels, and credits of the said deceased, which had or should come to the hands, possession, or knowledge of him the said *John Henry Skelton*, or into the hands and possession of any person or persons for him; and the same so made did exhibit or cause to be exhibited in the registry in the Prerogative Court of *Canterbury*, at or before the last day of

Even if it be an answer to breaches assigned on the condition of an administration bond, for not exhibiting a perfect inventory, or making a true and just account at or before a particular day, that there was no Court held on that day, it must be pleaded in excuse of performance, and cannot be given in evidence where the defendant has pleaded only *non est factum*, and breaches have been suggested on the roll, pursuant to 8 & 9 *W.* 3, c. 11, s. 8.

The administrator is not bound by the administration-bond to distribute the residue amongst the next of kin before there is a decree of the Ecclesiastical Court to pay over the residue.

November next ensuing; and the same goods, chattels, and credits, and all other the goods, chattels, and credits of the deceased at the time of his death, which at any time after should come to the hands or possession of the said *J. H. Skelton*, or into the hands or possession of any other person or persons for him, did well and truly administer according to law; and further did make or cause to be made a true and just account of his said administration at or before the last day of *May*, 1831; and all the rest and residue of the said goods, chattels, and credits which should be found remaining upon the said administrator's accounts, the same being first examined and allowed of by the Judge or Judges for the time being of the said Court, should deliver and pay unto such person or persons respectively, as the said Judge or Judges, by his or their decree or sentence, pursuant to the true intent and meaning of an act of Parliament, intitled, "An act for the better settling of intestates' estates," should limit and appoint: and, if it should thereafter appear that any last will and testament was made by the deceased, and the executor or executors did exhibit the same in the said Court, making request to have it allowed and approved accordingly, if the said *John Henry Skelton*, being thereunto required, did render and deliver the said letters of administration, approbation of such testament being first had and made in the said Court, then the obligation to be void, or else to remain in full force.

Upon this condition four breaches were suggested.—*First*, that the said *John Henry Skelton* (the administrator) did not make or cause to be made a true and perfect inventory of all and singular the goods, chattels, and credits of the said *Charles Frederick Schweitzer*, deceased, which had come to the hands, possession, or knowledge of him the said *John Henry Skelton*, and did not nor would exhibit, or cause to be exhibited, in the registry of the Prerogative Court of *Canterbury*, a true and perfect inventory, or any other inventory, at or before the last day of *No-*

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vember next after the date of the said writing obligatory, or at any other time, contrary to the form and effect of the condition.

Secondly.—That the said *John Henry Skelton* did not well and truly administer according to law the goods, chattels, and credits of the said *Charles Frederick Schweitzer*, deceased, which came to the hands and possession of the said *John Henry Skelton* after the death of the said *Charles Frederick Schweitzer*, amounting in the whole to a large sum of money, to wit, 30,000*l.*: but, on the contrary thereof, the said *John Henry Skelton*, after the same so came to his hands and possession as aforesaid, and before any or either of the said minors in the said condition mentioned attained the age of twenty-one years, wrongfully, unjustly, and injuriously, and contrary to the intent and meaning of the condition, wasted the same, and converted, appropriated, and disposed of the said goods, chattels, and credits, being of the value aforesaid, to his own use, and the same remain wholly unadministered, contrary to the form and effect of the condition.

Thirdly.—That the said *John Henry Skelton* did not make or cause to be made a true and just account of his administration at or before the last day of *May*, 1831, or at any other time before or since the day and year last aforesaid; but, on the contrary thereof, wholly neglected and refused so to do, contrary &c.

Fourthly.—That, on the 17th *November*, 1828, the said *C. F. Schweitzer* died intestate, leaving *J. S. Schweitzer*, and *F. Chopping* (wife of *F. H. Chopping*), *J. H. Skelton*, the younger, *J. S. Skelton*, *M. A. Skelton*, spinster, and *L. Skelton*, spinster, his next of kin. That afterwards, and after the death of the said *C. F. Schweitzer*, and after paying and discharging of all the just debts, claims, and demands of the said *C. F. Schweitzer*, and before the exhibiting of the plaintiff's bill, to wit, on &c., there remained and was in the hands and possession of the said *J. H. Skelton*, as administrator as aforesaid, a large sum of money,

to wit, 10,875*l.* 8*s.* 9*d.*, which might and ought, according to the condition of the said writing obligatory, to have been well and truly administered by the said *J. H. Skelton*, according to law, in manner following, viz. the sum of 533*l.* 14*s.* 10*d.* to *Elizabeth Younge*, spinster, administratrix with the will annexed of the goods and chattels of *J. G. Schweitzer*, deceased, for the use and benefit of *Ann Frances Schweitzer*, daughter and universal legatee of the said *J. G. Schweitzer*, deceased; the sum of 211*l.* 19*s.* to the said *Frances Chopping*; the sum of 1332*l.* 18*s.* 8*d.* to the said *J. H. Skelton*, the younger; the sum of 1332*l.* 18*s.* 8*d.* to the said *J. S. Skelton*; the sum of 1332*l.* 18*s.* 8*d.* to the said *Mary Ann Skelton*, spinster, and the sum of 1332*l.* 18*s.* 8*d.* to the said *Lucy Skelton*, spinster. Yet, the said *J. H. Skelton* hath not well and truly administered the last-mentioned goods, chattels, and credits of the said *C. F. Schweitzer*, deceased, or any part thereof, according to law, or paid, or delivered, or divided the same in manner aforesaid, or otherwise howsoever, but, on the contrary thereof, whilst the letters of administration were in full force, wrongfully, fraudulently, and unjustly converted and appropriated the same to his own use, contrary to the form and effect of the condition; and the said sums of money still remain unadministered, and wholly due and unpaid to the said *Elizabeth Younge*, administratrix as aforesaid, and to the said *F. Chopping*, *J. H. Skelton*, the younger, *J. S. Skelton*, *M. A. Skelton*, and *Lucy Skelton*, respectively.

The cause came on to be tried at the *London Sittings* after last *Michaelmas* Term, before Lord *Lyndhurst*, C.B., and a special jury, when a verdict was found for the plaintiff on the issue on the plea of *non est factum*, with one shilling damages, and one shilling damages on each of the breaches, subject to the opinion of the Court on the following case:

C. F. Schweitzer died on the 17th of *November*, 1828,

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intestate, leaving as next of kin, *J. G. Schweitzer*, his brother, *Frances Chopping*, his sister, and *J. H. Skelton*, the younger, *J. S. Skelton*, *M. A. Skelton*, and *Lucy Skelton*, infants, the children of *J. H. Skelton*, a deceased sister. *J. G. Schweitzer* died in or about six weeks after the intestate, leaving *A. F. Schweitzer*, a minor, his universal legatee and sole executrix; and administration of his estate and effects with the will annexed was granted to *E. Younge*. *F. Chopping* having renounced her right to the administration of *C. F. Schweitzer's* estate, administration thereof was duly granted on the 1st of *June*, 1830, to *J. H. Skelton*, one of the obligors, as the father and guardian, before then appointed by the Prerogative Court, to his children, the above-named infants, nephews, and nieces of the intestate, during the minority of the said infants, and until the eldest, viz. *J. H. Skelton*, the younger, came of age. The principal part of *C. F. Schweitzer's* property consisted of stock invested and standing in his name at the time of his death in the Three *per cent.* Consols. This stock, *J. H. Skelton*, the administrator, sold out in the month of *June*, 1830, and opened an account with the proceeds, amounting to 23,093*l.* 15*s.*, in his own name, in the Bank of *England*. He also received and paid in to his account 1125*l.* dividends due on the stock, and 575*l.*, a cash balance standing to the intestate's credit at the Bank, between the 2nd of *June* and the 25th of *July*, 1830. *J. H. Skelton* paid all the debts and funeral expenses of the intestate, and the expenses of and incident to his administration, by applying 14,085*l.* 14*s.* 8*d.* in the course of the administration.

In *September*, 1830, *J. H. Skelton* made out an account, and delivered the same to *E. Younge*, the guardian of the said *A. F. Schweitzer*.

By the end of *July*, 1830, *J. H. Skelton*, the administrator, appropriated the sums of 4,941*l.* 19*s.* and 5,119*l.* 15*s.* 10*d.* to his own use, and became bankrupt on the 2nd

of *June*, 1831. The Prerogative Court never requires an administrator to deliver an inventory or account before citation, and the same is very seldom delivered until called for. On the 13th of *June*, 1831, a citation issued against *J. H. Skelton*, the administrator, from the Prerogative Court, at the instance of *Elinabeth Younge*, as administratrix, to which he appeared; and, on the 5th of *July*, 1831, brought in an inventory and account on oath, and was dismissed in respect of the same, if not objected to on *caveat* day in August following.

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On the 1st of *December*, 1831, *E. Younge's* proctor prayed the Judge of the Ecclesiastical Court to allow the declaration instead of an inventory and account, and then in the registry of the Court; and the Judge having heard advocates and proctors thereon on both sides, and having examined and allowed the inventory, and the account exhibited, the same not having been objected to, referred the inventory and the account to the registrar of the Prerogative Court to report the amount of the residue of the goods, &c. of the intestate remaining on the administration account, and to what person or persons respectively the said residue was to be limited and appointed, and in what portions allotted, and directed all other matters to stand continued until the said report was brought in. On the 9th of *December* following, the registrar reported that it appeared upon the administrator's accounts, that a balance of 10,875*l.* 8*s.* 9*d.* remained unadministered, of which sum *Elinabeth Younge*, as administratrix of *J. G. Schweitzer*, was entitled to 5,331*l.* 14*s.* 10*d.*, the four children of the administrator, *J. H. Skelton*, to 5,331*l.* 14*s.* 10*d.*, and *Frances Chopping* to a small sum to make up her full share of 5,331*l.* 14*s.* 10*d.*

On the 4th *January*, 1832, this report was confirmed by the Prerogative Court.

On the 1st of *February* following, Miss *Younge's* proctor prayed the Judge to decree distribution of 10,875*l.* 8*s.* 9*d.*,

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remaining to be distributed according to the registrar's report, to which *J. H. Skelton*, by his proctor objected. He then asserted an allegation in the nature of a plea, shewing cause why no order could be made on him, the said *J. H. Skelton*, to pay or distribute any part of the goods, chattels, and credits of the said *C. F. Schweitzer*, deceased. The reasons stated by the said *J. H. Skelton*, in and by the said allegation, why no such order could be made upon him, were two: *First*, that his eldest son, *J. H. Skelton*, had attained his age of twenty-one years on the 21st of *July*, 1831; that the grant of administration to him had ceased; and that there was no legal personal representative of the said *C. F. Schweitzer*, deceased. And *secondly*, that he had been a trader according to the provisions of the bankrupt law; that, on the 7th of *June*, a commission of bankrupt issued against him; that he had in all things conformed himself to the bankrupt laws, and had duly obtained his certificate, which was allowed by the Lord Chancellor on 15th *September*, 1831.

Miss *Younge's* proctor admitted the several positions or articles of *J. H. Skelton's* allegations to be true, reserving for the consideration of the Court all questions of law.

On the 25th *February*, 1832, *J. H. Skelton* prayed the Judge to pronounce him not liable to be ordered to distribute the balance of the estate and effects of the intestate, by reason of his being a certificated bankrupt, and to dismiss him from the suit, which the Judge accordingly did.

On the 9th *February*, 1831, *Elizabeth Younge* executed a deed of release, prepared by her own attorney, to *J. H. Skelton*. *J. H. Skelton*, in *October*, 1830, and *April*, 1831, paid to Miss *Schweitzer*, half yearly dividends of 86*l.* 18*s.* 4*d.* each, as if that sum had been so invested. In fact, *Skelton* never invested the money, and the jury found that the release was a fraud by *Skelton*. *J. H. Skelton*, the younger, the eldest son of the adminis-

trator, came of age on the 21st *July*, 1831, during the pendency of the suit in the Prerogative Court. None of the children of the said *J. H. Skelton* were parties to the proceedings which took place in the Prerogative Court, and the bond was ordered to be sued upon at the instance of the said *Elizabeth Younge* alone. A release had been executed by Mr. and Mrs. *Chopping*, and upon whose share no question arose. There was no Prerogative Court on the last day of the month of *November*, 1830, nor on the last day of *May*, 1831. No party can render an account without a court. The administrator might have procured special courts to be holden on those days; and there were sittings between the receipt by the administrator of the monies and stock aforesaid, and the last day of *November*, 1830, and between that day and the last day of *May*, 1831, at which an inventory and account might have been rendered; and, if an inventory and account had been given in before or on either of the first or second court days subsequent to the last day of *May*, 1831, a decree might, providing it was an amicable proceeding, and unless there was an objection, have been obtained for the payment of the sums unadministered by the 27th *June*, 1831.

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The question for the opinion of the Court was, Whether there was any breach of the condition of the bond suggested upon the record, on which the surety, *Robertson*, could be charged in this action. The Court were to give any directions they thought proper on the whole record. But, if the Court was of opinion that there was any breach of the condition suggested on the record on which damages could be entered up, the Court should order that damages should be assessed on any of the breaches.

Kelly, for the plaintiff.—In this case there are several breaches assigned, but the most material is the second, which is, that the said *J. H. Skelton* did not well and truly administer, according to law, the goods, chattels, and credits of the intestate. The facts, as relates to this

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breach, were simply these—that *Skelton*, having become administrator in *June*, 1830, sold out stock, late the property of the intestate, to a large amount, and opened an account at the Bank, with the proceeds, in his own name; that, within a month after, and before it was necessary to account, according to the condition, and before the children came of age, *Skelton* appropriated and converted to his own use a sum of 10,875*l.* 8*s.* 9*d.*; and the question is, whether that is a breach of the condition of this bond, well and truly to administer according to law? Now, what is the meaning of the words, “well and truly to administer according to law?” In the *Archbishop of Canterbury v. Tappen (a)*, it was held that an administrator is not, by the condition of the bond, bound to distribute the surplus of the intestate’s estate after payment of debts, &c., until a decree directing him so to do has been made by the court in which his inventory and account have been exhibited. But all that was decided there was, that a mere nonfeasance, a mere nonpayment according to the statute of distributions, was not a breach of the condition. It will appear from the pleadings in that case, that no question like the present could have arisen. There, the administrator had been guilty of no mal-administration, but had merely neglected to distribute. That case, therefore, leaves the present untouched. The next case relied on is, the *Archbishop of Canterbury v. Wills (b)*. The question there was, whether the administrator was bound to account without being cited; and it was held that he was. In the subsequent part of the case, however, Lord *Holt* is reported to have said, “And whereas, by the words of the condition, he is to administer well and truly,—that shall be construed in bringing in his account, and not in paying the debts of the intestate; and therefore a creditor shall not take an assignment of the bond, and sue it, and assign for

(a) 8 B. & C. 151.

(b) 1 Salkeld, 315.

breach the nonpayment of a debt due to him, or a *devastavit* committed by the administrator, for that would be needless and infinite." As far as this is an authority to shew that "well and truly to administer according to law," does not import a distribution of the residue amongst the next of kin, it is admitted to be a good decision Lord *Tenterden* cites it for that purpose in *Tappen's* case; and, if it were otherwise, the administrator might be guilty of a breach of the condition the very moment after he had received the money. But, if it is meant to be said, that it is to be understood that "well and truly to administer" means bringing in his account, that cannot be. There are two distinct conditions, the one to administer, and the other to account; and Lord *Holt* cannot have meant literally what he is reported to have said. He cannot have meant that "well and truly to administer" is, to bring in the account. It would be quite absurd to have in the same bond different conditions, if they are intended to have one and the same meaning. Besides, what is reported to have fallen from L. C. J. *Holt* was merely an *obiter dictum* and extrajudicial. [Lord *Lyndhurst*.—Suppose a legatee was to sue on this bond, to what extent would he be entitled to recover? Suppose there were ten legatees, and 10,000*l.* had come to the administrator's hands to be distributed, and the legatee who sued was only entitled to 1,000*l.*?] The Archbishop would be entitled to recover the whole; he would have his judgment for the penalty; and, if it did not appear that there had been a breach as to the others, they might come in afterwards into the Ecclesiastical Court. Although Miss *Younge* was only entitled to 533*l.* 14*s.* 10*d.*, the Archbishop is the plaintiff, and he is entitled to recover the whole. In *Green-side v. Benson* (a), it was decided that the obligee of an administration bond may assign a breach in not delivering a

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true and perfect inventory, even without citation. That case was cited by Lord *Tenterden* in *Tappen's* case for the same purpose as the Archbishop of *Canterbury v. Wills*. [Lord *Lyndhurst*.—In *Greenside v. Benson*, as reported in *Atkyns*, it is stated that there was no defence, and that there was judgment by default; but there was certainly a verdict there (a). *Bayley*, B.—In this case, there is virtually a judgment by default, because the defendant has only pleaded *non est factum*.] No case has ever decided that the misfeasance of the administrator in fraudulently converting the effects of the intestate to his own use, is not a breach of the condition “well and truly to administer;” and it will be found, on reference to the statute, that the object of the statute was to secure to the legatees the due payment of their legacies; and it requires that the administrator shall enter into a bond with two or more able sureties, respect being had to the value of the estate. It is of importance that the public should know that they have substantial security against the fraud or failure, by accident or dishonesty, of administrators. Now, what is the meaning of these words, “well and truly to administer according to law?” [*Bayley*, B.—There was in *Tappen's* case a specific breach, not a general breach.] The plaintiff does not seek to charge the administrator for a mere nonfeasance, but for a specific malfeasance. The administrator is, in the first place, to make and exhibit a true and perfect inventory of the intestate's goods; secondly, he is well and truly to administer them according to law; thirdly, he is to make a true account of his administration; fourthly, he is to deliver and pay the residue remaining on his account to the persons appointed by the decree of the Spiritual Court. [Lord *Lyndhurst*.—So that

(a) The roll was afterwards searched, and it appears that the declaration was for the penalty of the bond. Plea, performance of

the whole condition. Replication, that the administrator had not exhibited an inventory.

he cannot pay over until there is a decree.] But what is the meaning of the intermediate condition? It must have some meaning. What does the obligation bind the administrators to do in the interim between the receipt of the intestate's goods and the decree? The statute intended that something should be done by him which required sureties; if not, in many cases its provisions would be useless. Suppose an administrator who had converted the intestate's effects, were to die intestate before the time allowed for the obtaining any decree ordering him to pay over the surplus, could it be contended that the surety would not be liable? Suppose the next of kin would not administer, then the Ordinary, whose officer the administrator is, must do so. If it were held that the surety was not liable in such a case, the statute would be ineffectual. It is impossible to say that there must be a decree in every case before there can be a breach of the condition. The cases are all in favour of the plaintiff; for, the utmost that is said is, that non-payment and non-distribution cannot be assigned as breaches, before there is a decree to pay over the residue. It is quite true, there must be a decree before the administrator can commit a breach for non-distribution. In *Tappen's* case, Lord *Tenterden* says: "The clause in the condition by which he is required thus to administer, precedes the clause by which he is required to make a true account of his said administration; and this also precedes the clause by which he is required to deliver and pay the residue which shall appear upon his account to such persons as the Court shall, according to the statute, appoint. Let us, then, see how the order and course of proceeding, thus marked out in the condition of the bond, agrees with the statute." It seems, therefore, that "well and truly to administer" means something to be done prior to the delivering the account. Then, what can it mean but that he is to use due diligence to collect the effects and credits of the intestate, and securely to keep

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them, so that, when the time comes for delivering the account, he may be able to deliver a just and perfect one. When the time comes for rendering an account, how can he say that he has well and truly administered, when he has reduced a large sum of money into his possession, and appropriated it to his own use. If that is not the meaning of the condition, how, according to any construction, can there be any breach of the condition well and truly to administer whatever at any time? Suppose the administrator dies, the Ordinary is bound to administer. No decree can be made against the former administrator, he being dead; and then, as there would be no assets left for the new administrator, the legatees would be defrauded of their legacies. In every case where the administrator, having received assets, which he has appropriated to his own use, becomes insolvent, the surety ought to be held liable. If it were held no breach in the administrator to embezzle the assets of the intestate, the surety would then not be liable, and the intention of the Legislature would be frustrated. To "administer" means to intermeddle; and the taking possession of the effects is an administering (*a*). If this be an administration at all, it is quite clear that it is a wasting and a mal-administration. A mandamus lies (*b*) against the Ordinary to grant administration even to a pauper; and therefore it is of the greatest importance that the surety in these cases should be held liable. [Lord *Lyndhurst*.—It is a very ordinary case, and yet no action has been brought. My experience on the other side of the Court is, that executors are often not able to pay what they ought, and yet the parties aggrieved do not bring actions on the administration-bond. I mention this, because the words are so simple that at first sight it staggers one that no action was ever brought.] The intent of the words in the condition is plain, and the intent of the statute is also clear; but these bonds have been

(*a*) Went. 158; Toller, 124, 429. (*b*) *Rex v. Sir R. Raines*, Carth. 417.

treated as mere matter of form, and no one has ever thought of putting them in suit. But there are cases also where there has even been a decree and yet no action has been brought. [*Bayley, B.*—There is a case in *Cowper*, 141, the Archbishop of *Canterbury v. House*. There it was held, that a creditor has a right, *ex debito justitiæ*, as well as the next of kin, to sue upon the bond in the name of the Ordinary.] Lord *Mansfield* there referred to the various clauses of the condition in the bond as substantive matters to be really performed; Lord *Tenterden* did so also in *Tappen's* case, which is an answer to the argument founded on the fact that actions on these bonds have not been frequently brought. If the due administration of the intestates' effects, within the meaning of the condition, does not include the taking care of the money and assets, and forbearing to spend and waste them, what does it mean?

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As to the other breaches, the question is, whether real or nominal damages ought to be assessed. There is no ambiguity in the words to exhibit an inventory by a particular day, and deliver an account by a particular day. [*Lord Lyndhurst.*—You assume that you are entitled to nominal damages. The administrator is to bring in an inventory by a particular day; but it was found, as a fact, that there was no Court sitting on that day; and, according to the Archbishop of *Canterbury v. Wills*, that was a sufficient excuse.] If that was a sufficient excuse, the defendant ought to have pleaded it. It is entirely by his own default that he has not availed himself of that defence. By the condition, the administrator is bound to bring in the inventory by a particular day. But, according to the practice of the Ecclesiastical Court, the administrator is not obliged to bring in the inventory and account until it is called for. [*Bayley, B.*—The practice is quite immaterial.] The administrator binds himself to bring in the account be-

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fore a particular day, and it is no answer to say that there was no court held on that day. The point in the case in *Salkeld* was, that he must not only plead that no court was held, but that he was there ready. But if that is good law, the defendant ought to have pleaded it. This judgment is in the nature of a judgment by default. It is quite clear there must be nominal damages; because, by the words of the statute, the jury are to assess damages "upon such of the breaches as the plaintiff, on the trial of the issues, shall prove to have been broken;" and Mr. Serjt. *Williams* says (a), "If the defendant plead to issue, the jury upon the trial *must* assess damages for such of the breaches assigned as the plaintiff shall prove to have been broken, otherwise the verdict will be erroneous, and a *venire de novo* will be awarded. So it is where there is a judgment upon demurrer or by default."

The *Solicitor General*, *contrà*.—The costs are comparatively of little importance; but if there is no breach well assigned, or, if the breaches are not proved as laid, the defendant is entitled to judgment. It has been said that the defendant is bound to plead that there was no court held on the particular day; but, if the plaintiff does not assign breaches in the declaration, but merely suggests them on the roll, then the plaintiff must prove them, because they are not admitted by the pleadings. [Lord *Lyndhurst*.—Suppose breaches are assigned in the declaration, and the defendant pleads denying the breaches, and also *non est factum*, and there is a verdict for the *defendant* on the assignment of breaches, and for the *plaintiff* on *non est factum*, would or would not the plaintiff be entitled to judgment? Suppose the defendant contents himself with denying the breaches, is or is not the plaintiff entitled to judgment?] He is not, if all the breaches were negatived; for then it would appear that the defendant had commit-

(a) 1 Wms. Saund. 58, n. 1.

ted no breach at the time the action was commenced; but the material question is upon the second breach: it is quite clear that the words "well and truly administer" are not used in their popular or legal sense; because, if they mean that you are to prove *plene administravit*, you must prove the payment of debts in their due order. Nor are the words in the statute of 22 & 23 Car. 2, c. 10, used in their ordinary sense. Formerly, the administrator was entitled exclusively to enjoy the residue of the testator's effects after payment of the debts and funeral expenses (a); to remedy that, came the statute of distributions, which directs how and to whom the residue is to be distributed. [*Bayley, B.*—There are two objects of that statute; one, that the residue shall be forthcoming, and another, that it shall be duly divided.] There is no preamble to that statute. The object of the bond is mentioned in the 3rd section; but nothing is said about safe custody of the assets, and nothing about the duly collecting of the debts of the intestate; it was merely done for the purpose of enabling that to be done by the administrator, which the Ordinary was formerly obliged to do. "Duly to administer" does not mean payment of debts in due order; and a *devastavit* cannot be alleged as a breach of the condition. *Brown v. Archbishop of Canterbury* (b). [*Bayley, B.*—It would be exactly the same to the next of kin, whether the administrator paid the money to a simple contract or a bond creditor.] It has been said, that what L. C. J. *Holt* is reported to have said, in the case of the Archbishop of *Canterbury v. Wills*, was a mere *obiter dictum*, but the same point was decided in *Brown v. Archbishop of Canterbury*. If the words "truly administer" are used in their ordinary sense, then, supposing that the administrator had money in his hands and refused to pay a bond creditor, that would be a breach of the condition if the plaintiff's construction were right; but in *Brown v. Archbishop of Canterbury* that was held not to be a breach of the condition.

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(a) Williams on Executors, 905-6.

(b) Lutwyche, 882,

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[Lord *Lyndhurst*.—How can you reconcile that case with the case of the Archbishop of *Canterbury v. House*, where it was held that a creditor has a right to sue on the administration bond?] The decision there did not turn on the disposition of assets, but on the administrator's not exhibiting an inventory. L. C. J. *Holt* says, that a creditor shall not take an assignment of the bond and sue it, and assign for breach the non-payment of a debt to him, or a *devastavit* committed by the administrator; for that would be needless and infinite. If the bond were conditioned for the administrator doing his duty, then it would be a breach if he omitted to pay debts; because it is his duty to do so; so that the case in *Lutwyche* shews that that is not a breach of the condition. [*Bayley*, B.—The non-payment of debts does not hurt the next of kin, and, therefore, it is quite immaterial to them whether a bond or simple contract debt is paid off.] But the non-payment of debts in due order would be a breach of his duty. Lord *Tenterden* says, in the case of the Archbishop of *Canterbury v. Tappen* (a), "the question is not, whether such a neglect or refusal be a breach of the duty of the administrator, but whether it be a breach of the condition of the bond." He intimates a clear opinion that the administrator had been guilty of a breach of duty, yet he was held not liable to the action. Lord *Tenterden* notices the doctrine of Lord *Hardwicke*, as recognizing what L. C. J. *Holt* had said, that "well and truly to administer" is to be construed in bringing in the administrator's account. [Lord *Lyndhurst*.—The administrator is to do three things: he is to make an inventory of the goods; he is to administer them truly; and to make a just account of his administration—these are three distinct things. *Bayley*, B.—And there is this expression, and *further* to make a true and just account.] The words "duly administer" are not used in the sense of *plene administravit*. Suppose negligence, and the property lost, the administrator would be

(a) 8 B. & C. 156.

liable to a creditor on the plea of *plene administravit*; but can it be said that that would be a breach of the condition of the bond? Is it to be said, that, on every occasion, where there is any misconduct on the part of the administrator, it will amount to a breach of the condition, well and truly to administer. Until there is a final decree, there is no prejudice, because the administrator until decree is not bound to provide the money. [Lord *Lyndhurst*.—He has no right to use it for his own purposes.] But if he has the money forthcoming when the decree is made, can it be said that there is a breach of the condition? It is sufficient that the administrator has the money forthcoming when the decree is made. It is, therefore, submitted that nominal damages only should be assessed on all the breaches.

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Kelly, in reply.—Assuming that, according to the case of the Archbishop of *Canterbury v. Wills*, the defendant might have pleaded that no court was held on the particular day; he has not done so, and, therefore, he cannot avail himself of that as a defence. The statute intended not only that the surplus should ultimately be distributed to the next of kin; but, also, that the assets, when collected, should be securely kept for them until distribution, either with or without a decree. The case of *Brown v. Archbishop of Canterbury* merely shews that the non-payment of a debt due from the intestate is no breach of the condition well and truly to administer. In the present case the plaintiff relies on the flagrant malfeasance of the administrator.

Cur. adv. vult.

The judgment of the Court was now delivered by

LORD LYNTHURST, C. B.—This was an action brought upon an administration bond, at the instance of the next of kin, against the surviving surety. The defendant pleaded *non est factum*; upon which the plaintiff took issue, and suggested various breaches upon the roll: *first*, that the administrator did not make a true and perfect inventory of

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the goods of the intestate; *secondly*, that he did not well and truly administer, according to law, the goods of the intestate; *thirdly*, that he did not make a true and just account of his administration; and *lastly*, that he did not pay over the residue to the next of kin. The facts of the case, as they appeared upon the trial, were these: the administrator possessed himself of the effects of the intestate to a considerable amount; he applied a part of them in discharge of the debts of the intestate, and of the funeral expenses; he applied another part in payment of one of the next of kin; but there was a large balance, amounting to more than 10,000*l.*, which he applied and converted to his own use; he became a bankrupt, and that sum of money was entirely lost to the estate of the intestate. The main question under these circumstances is this: Was this conduct of the administrator a breach of that part of the condition of the bond by which he undertook "well and truly to administer the effects of the intestate?" Now, looking at the language of the bond, nothing can be more distinct and precise than those terms of the condition. They are, that he shall well and truly administer, according to law, the effects which shall come to his hands, and all other the effects of the intestate that shall come to the hands of any person or persons for him to be administered. It would seem difficult to entertain any doubt upon the natural construction of these words, and nothing would be a more direct infringement of the terms of the condition than the application of the effects of the intestate to his own use, and the converting them to his own purposes, so that they should be entirely lost to the estate of the intestate. Considering, therefore, the condition of the bond, according to the ordinary terms of construction, and according to the natural import of the words, it appears to us that this conduct of the administrator is a breach, and a direct breach of the condition of the bond. And the only question, therefore, would be, whether there is any thing in the scope and intention of the act of Par-

liament, or any thing in the decisions which have taken place with reference to this subject, to lead us to put upon this condition of the bond an interpretation different from that which its ordinary terms, and the language in which it is expressed, imports?

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Now, with respect to the act of Parliament—this statute, commonly called the statute of distributions, was passed for the purpose of facilitating the distribution of the effects of intestates, that is, the residue of their effects, amongst the next of kin; and there is nothing in the scope of the act of Parliament, the object to which it was directed, or its provisions, which at all lead us to the conclusion that we ought not to put upon the terms of this condition that construction which the language of the condition itself naturally imports and conveys.

Then, with respect to the decisions upon this subject, which were relied upon at the bar—the first case to which reference was made, was the recent decision of the Archbishop of *Canterbury v. Tappen (a)*. It does not appear to us that there is any thing in the decision in that case at all affecting the interpretation which we put upon this condition of the bond; in that case the question and the only question was, whether the administrator was bound to distribute the residue of the testator's effects amongst the next of kin, before the ecclesiastical judge had pronounced a decree for that purpose. The Court was of opinion that the administrator was not bound to make a distribution before the decree, and they founded that decision upon the language of the condition—"That he shall deliver and pay all the rest and residue of the goods which shall be found remaining upon his account, to such persons respectively as the judge of the Court shall, by decree or sentence, pursuant to the statute, limit and appoint." The Court, therefore, was of opinion, upon the obvious construction of that clause, that it was necessary, before there could be a breach of the condition, that the

(a) 8 B. & C. 156.

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ecclesiastical judge should pronounce his decree. And, as that was provided for by this special condition, they were of opinion that it was not a breach within the second condition, namely, "that he should well and truly administer according to law the goods and effects of the intestate." There is nothing, therefore, in the decision of the case of the Archbishop of *Canterbury v. Tappen* at variance with the opinion which we have formed with respect to this part of the condition of the bond.

Another case cited was the case of *Brown v. Archbishop of Canterbury (a)*. In that case the plaintiff was a creditor, and the plaintiff, in his replication, had assigned as a breach of the condition of the bond, that the intestate was indebted to him by bond in a sum of 200*l.*; that assets to that amount had come to the hands of the administrator, and that the bond debt was not paid by the administrator. The Court of *King's Bench*, upon demurrer, gave judgment for the plaintiff: upon a writ of error, that judgment was afterwards reversed, upon the ground, as the Court stated, that the breach assigned was not within the meaning of the condition. That decision, as I understand it, amounted to this—that the object of the act was not to provide a remedy for creditors, for they already had by law a remedy for the recovery of their debts; and therefore, that the breach so assigned was not within the intent and meaning of the act of Parliament—within the meaning of the legislature at the time they passed that law.

Another case that was cited was the case of Archbishop of *Canterbury v. Wills*, which is reported in *Salkeld*; and is also reported in 11 *Modern*. In that case the question was, whether the administrator was bound, before he was cited, to make and deliver his inventory, and the Court was of opinion, that he was bound to make and deliver his inventory without any previous citation—that was the main point in the judgment of the Court in that case.

(a) Lutw. 882.

It is true, L. C. J. *Holt*, in the course of giving judgment in that case, said—"By the words of the condition he is to administer well and truly, that shall be construed in bringing in his account, and not in paying the debts of the intestate. And therefore a creditor shall not take an assignment of the bond, and sue it, and assign for a breach the non-payment of a debt to him, or a *devastavit* committed by the administrator, for that would be needless and infinite." What I understand to have been the meaning of L. C. J. *Holt*, upon that occasion, was this, that a creditor shall not sue for his debt upon the bond even if he suggests a *devastavit*. The same case is reported in *Modern*, but in the report in *Modern* the main point only is noticed and what L. C. J. *Holt* is stated to have said in the report of the case in *Salkeld* is not mentioned; but the interpretation which I have put upon what fell from L. C. J. *Holt* upon that occasion is consistent with the decision in *Lutwyche*, to which I have referred, namely, that the object of the act and of the bond was not to provide a remedy for creditors; the object was, to take care of the effects of the intestate, for the benefit of those persons who were entitled to distribution as next of kin.

The cases, of *Greenside v. Benson*, and of the Archbishop of *Canterbury v. House*, were also cited. Those were cases of actions brought by creditors for not delivering an inventory; and it has been decided in those cases, and has been the practice, and has been considered as law, that creditors may sue upon the bond where the inventory has not been delivered; but what Lord *Hardwicke* says in *Greenside v. Benson* confirms what was said by L. C. J. *Holt*, and confirms also the decision of the case in *Lutwyche*. Lord *Hardwicke* says, "What the counsel for the plaintiff aimed at would have been right, supposing the ordinary had assigned for breach the non-payment of the creditors' debts." So that all the authorities go to shew that the creditors cannot put the bond in suit; that the non-payment of debts due to creditors can-

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not be assigned as a breach; but it does not appear to me that the decisions in those cases at all affect the present question. There is nothing, therefore, either in the construction of the act of Parliament, and its obvious intention and import, and nothing in the cases to which I have referred, at all affecting the interpretation which we put upon this condition, namely, that when the administrator applies and converts to his own use the effects of the intestate, so that those effects are entirely lost to the estate of the intestate, that is such a breach of the condition of the bond by which the administrator undertakes "well and truly to administer according to law," as will entitle the next of kin to have the bond put in suit at their instance. We are of opinion, therefore, that, so far as relates to the second breach, the plaintiff is entitled to recover the full amount of money that has been so misapplied, that sum amounting in this case to 10,875*l.* 8*s.* 9*d.*

With respect to the other breaches that have been assigned, and upon which nominal damages have been assessed, the first of those breaches is for "not rendering and making a full, true, and perfect inventory of the goods of the intestate." It was suggested at the bar, in the course of the argument, that the administrator had a sufficient excuse for not having made and returned such an inventory, because that inventory was to be made and returned upon a particular day, and that no court sat on that day. Supposing that to be a valid and sufficient excuse, it must have been pleaded in excuse of performance, and could not have been given in evidence without such plea; and we are of opinion that it could not have been pleaded to a suggestion of breaches; but if the defendant, instead of confining himself to the plea of *non est factum* (as he has done in this instance), had thought proper to avail himself of the right which he had to plead further, he might, if this had been a valid and sufficient excuse, have availed himself of it in the shape of a plea by way of excuse of performance; we

are of opinion that he cannot avail himself of it upon this assignment of breaches; and we think, therefore, that the plaintiff is entitled to nominal damages upon the first breach. The same argument and observations will apply also to the third breach—that he did not make a true and just account of the said administration, on or before the day named in the bond. In that case, also, if the administrator intended to have availed himself of this excuse of performance, he should have done it by plea. We are of opinion that he cannot avail himself of this in evidence in the present stage of the proceedings.

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With respect to the last breach, namely, that he should pay over the rest and residue amongst the next of kin, we are of opinion that the fourth assignment of breaches is not sufficient; because, by the condition of the bond, it was necessary that the decree of the Court should precede the distribution, and no decree of the Court is stated in the assignment of the breach. We are of opinion, under such circumstances, that there should be no damages assessed upon that breach; and the course will be, as far as relates to that breach, that the jury should be discharged. We are of opinion, upon the whole, that the plaintiff is entitled to nominal damages upon the first and third breaches; and upon the second breach (the principal subject of argument), that he is entitled to damages to the full amount of the money that has been misapplied, namely, to the amount of 10,875*l.* 8*s.* 9*d.*

Jervis inquired whether the decision extended to the money that was due to the children.

LORD LYNTHURST, C. B.—The action is brought at the instance of the next of kin in the name of the Archbishop; the whole, therefore, will be paid into the Ecclesiastical Court—the Ecclesiastical Court will have the jurisdiction as to the application of the whole; it becomes the effects

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of the intestate, which will be distributed under the decree of the Ecclesiastical Court.

Postea to the plaintiff.

THE Solicitor General afterwards applied to the Court to turn the special case into a special verdict, that the defendant might have the advantage of bringing the question before a Court of Error.

The Court refused the application, and declared that they had no power to grant it (a).

(a) See 1 C. & J. 372.

HALL, Gent., One &c., v. ASHURST, Gent., One &c.

The solicitor of the *London* creditors of a bankrupt in the country wrote to *B.*, the solicitor of the country creditors of the same bankrupt, the following letter: "I am willing, on behalf of the *London* creditors, to bear two-thirds of the expense of Messrs. *B.* and *B.* or such barristers as you may think fit for resisting Mr. *K.*'s proof under the commission, and of investigating the accounts of the assignees at the meeting on the 18th instant.

I hereby undertake to bear and pay on behalf of these creditors two thirds of the expenses incident thereto accordingly." And the meeting being afterwards adjourned, *A.* wrote to *B.* another letter, in which he said, "I shall have no objection to bear as before the proportion of expense of the barrister attending the meeting stated in your letter:"—*Held*, that *A.* was personally liable for the proportion of the expenses.

SPECIAL *assumpsit*.—The six first counts of the declaration were framed on an undertaking to bear and pay, on behalf of certain creditors, two-thirds of the expenses of attending certain meetings of commissioners of bankrupt, and resisting the proof of one *K.*, who claimed to prove under the commission. There were counts for work and labour, money paid &c. Plea—The general issue.

At the trial, before Lord *Lyndhurst*, C. B., at the *London* Sittings after last *Hilary* Term, it appeared that the plaintiff was the solicitor employed by the country creditors of one *Rose*, a bankrupt, and the defendant was employed as the solicitor to *Rose's London* creditors. On the 12th *December*, 1831, the plaintiff wrote to Messrs. *White* and *Greenwell*, *London* creditors of the bankrupt, respecting a claim to prove a sum of 1,700*l.* by one *K.*

who held a warrant of attorney executed by the bankrupt. On the 15th *December*, the defendant wrote the following letter to the plaintiff:—

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“ *Re Rose,*

“ 84, *Newgate-street, London.*

“ Sir,—Your letter of the 12th instant to my clients, Messrs. *White* and *Greenwell*, has been handed to me. They are members of the *City of London Association*, and assembled with the other members, who are creditors, this morning. Your letter was laid before them, and they determined to co-operate with the other *bond fide* creditors in protecting the interests of the creditors at large, and defeating the partial purpose intended to be effected by the warrant of attorney granted to *K., &c. &c.*

(Signed) “ *W. C. Ashurst.*

“ *H. W. Hall, Esq.*”

The plaintiff afterwards communicated to the defendant that it was in contemplation to attend a particular meeting of the commissioners by counsel, in order to oppose the claim of *K.*; in answer to which communication the defendant wrote to the plaintiff a letter containing therein as follows:—

“ *Re Rose.*

“ 84, *Newgate-street, April 13, 1832.*

“ Dear Sir,—I am willing, on behalf of the *London* creditors, to bear two-thirds of the expense of Messrs. *B.* and *B.*, or such barrister as you may think fit, for resisting Mr. *K.*'s proof under the commission, and of investigating the accounts of the assignees at the meeting on the 18th instant. *I hereby undertake to bear and pay on behalf of these creditors two-thirds of the expenses incident thereto accordingly.*”

“ *H. W. Hall, Esq.*”

The meeting took place on the 18th, and was adjourned to the 28th; which was communicated by the

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plaintiff to the defendant, who, in answer to that communication, wrote to the plaintiff as follows:—

“ *Re Rose.*

“ 84, *Newgate-street, London, 26th April, 1832.*

“ Dear Sir,—I shall have no objection to bear, as before, the proportion of the expense of the barrister attending the meeting stated in your letter.”

Several other adjourned meetings took place, and the claim of *K.* was reduced by a large amount.

The plaintiff had a verdict upon this evidence, with leave to the defendant to move to enter a nonsuit, on the ground that the defendant's undertaking did not bind him personally. *Talfourd*, Serjt., obtained a rule accordingly ; against which, cause was now shewn by

Ball.—The question here is, whether the defendant has not made himself personally liable. In *Burrell v. Jones* (a), the solicitors of the assignees of a bankrupt tenant were held personally liable to the landlord upon a written undertaking, whereby they “ as solicitors to the assignees,” undertook to pay the landlord his rent. The Lord Chief Justice, in giving judgment in that case, referred to *Appleton v. Binks* (b), where it was held that one who covenanted for himself, his heirs, executors, &c., for the act of another, was personally bound by his covenant, although he described himself in the deed as covenanting for and on behalf of such other person. [Lord *Lyndhurst*, C. B.—In *Appleton v. Binks*, the covenant was for and on the part and behalf of another person. Here the undertaking is to bear and pay on behalf of the creditors. There is no inconsistency in either case in a party, for himself or for his heirs, covenanting or undertaking to do an act for or on behalf of another party. The undertaking here is not an undertaking on the behalf of another person to do an act,

(a) 3 B. & Al. 47.

(b) 5 East, 148.

but it is an undertaking to do an act on the behalf of another person.] The present case is stronger than *Burrell v. Jones*, for there the principals were named, but here they are not named. In *Iveson v. Conington (a)*, the Court of *King's Bench* decided, that the defendants were liable personally on an agreement by which the plaintiff and defendants, who were the respective attorneys for a plaintiff and defendant in a cause, personally consented and undertook that the record should be withdrawn, and which contained other things to be done by the plaintiff and defendant in the suit; and the Court said that the case was not distinguishable from *Burrell v. Jones*. [*Vaughan, B.*—There the word “personally” was used in the undertaking]. In *Scrace v. Whittington (b)*, the attorney was held personally liable, although there was no express undertaking on his part to become personally liable. [*Bayley, B.*—*Scrace v. Whittington* turned on the usage of the profession of attorneys, who, when employed by other attorneys, look to the attorneys who so employ them, and not to the clients of the other attorneys. The question of credit was left to the jury, who found that the credit was given to the defendant and not to his client. The Court said, that if, in such case, the attorney intended not to be personally liable, it was his duty to give express notice that the business was to be done upon the credit of the client.]

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Talfourd, Serjt., and Hoggins, contrà.—There is no doubt that an agent may contract so as to bind himself personally. The question here is, whether the defendant has done so. [*Bayley, B.*—With whom do you say that the contract was made?] The *London* creditors. The

(a) 1 B. & C. 160.

(b) 2 B. & C. 11.

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defendant mentions all the *London* creditors, and the question is, whether the expression on behalf of all the *London* creditors is to be considered merely as a description of the character the defendant filled. [Lord *Lyndhurst*, C. B.—The creditors are introduced to point out the proportion of the expenses which it was reasonable should be paid on their behalf. Then the defendant says that he undertakes to bear on their behalf, not, that he undertakes on their behalf. There is no inconsistency in one man undertaking to bear expenses on behalf of another.] The present case is distinguishable from those which have been cited. In *Iveson v. Conington*, the word “personally” was used, and the main question was, the extent of the personal liability. In *Burrell v. Jones*, the case turned very much on the expression, “as solicitors.” If they were not bound, nobody would have been bound. *Holroyd, J.*, said, “If they are not, nobody is bound by this undertaking, for it is perfectly clear that the assignees are not bound.

Lord *LYNDHURST*, C. B.—I do not think that *Burrell v. Jones* turned so much on the expression “as solicitors,” as upon the fact that the defendants were the solicitors; and in that respect this case is similar, for the defendant here is the attorney. What is there here to shew that the *London* creditors were bound? It appears to me that there is nothing inconsistent in the defendant, as attorney for these creditors, giving his personal liability on behalf of his client. The case seems to me to fall within the authorities which have been cited; and it is not probable that *Hall* could have supposed that the business was to be done on the responsibility of all these creditors; it is much more likely that he supposed that he was incurring these expenses on the personal liability of the defendant. The ground of my judgment is, that the letter of the 13th

April shews precisely that the defendant contracted personally with the plaintiff. It is a contract that he would bear and pay for other persons, not a contract on behalf of other persons to bear and pay.

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BAYLEY, B.—I think that the letter of the 13th *April* cannot fairly be construed in any other way than as an undertaking by the defendant to be personally liable. If the commencement of the letter were equivocal, the words “I undertake to bear and pay,” are clear. The plaintiff would have a right to expect from that letter, that the defendant was to be the paymaster. The letter of the 26th *April* is equally clear. This construction, also, is the most consistent with common sense, for the plaintiff would know *Ashurst* only, and probably knew nothing of the *London* creditors or their solvency, whilst *Ashurst* would certainly know his own client. The present case is the same as *Burrell v. Jones* in principle, and is not distinguishable from that decision in any material circumstance.

VAUGHAN, B.—It is admitted that the defendant might legally make himself liable to these expenses, and the only question is, whether, on the true construction of these letters, he has done so. It appears to me that the intention of the parties was clear. No prudent man would have been content with the responsibility of the great body of creditors, whom he did not know. After the first letter to Messrs. *White & Greenwell*, the plaintiff appears to have communicated with the defendant alone, and to have given the credit to him alone.

BOLLAND, B.—I am of opinion that the only fair construction to be put upon the letter of the 13th of *April* is, that it amounts to a formal agreement, on the part of

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Rule discharged.

HEWITT v. MELTON.

A *distringas* for the purpose of proceeding to outlawry will be granted upon affidavit, upon which the Court would not grant a *distringas* for the purpose of proceeding to enter an appearance for the defendant.

PLATT moved for a *distringas*. The affidavits were not sufficient to warrant a *distringas* upon which to proceed for the purpose of entering an appearance.

BAYLEY, B.—You may have a *distringas* for the purpose of proceeding to outlawry.

LORD LYNTHURST, C. B.—We think that upon this affidavit you are entitled to a *distringas* for the purpose of effecting an outlawry, though not to one for the purpose of proceeding to enter an appearance for the defendant.

Writ for the purpose of proceeding to outlawry (a) granted.

(a) The form of the notice at the foot of the writ is different. See No. 3 in the Schedule to 2 W. 4, c. 39.

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JONES v. JONES.

COVENANT by the trustee under a marriage settlement. Plea—*Non est factum*.

At the trial, before *Parke, J.*, at the last Spring Assizes for the county of *Hereford*, it appeared that all the parties to the deed, except the plaintiff, who was the trustee for the intended wife, assembled to execute the settlement. The defendant, who was the father of the intended husband, and the sole conveying party, executed and delivered the deed; and, immediately after the execution by him, and before any of the other parties executed, the father of the intended wife objected to a clause which contained a power of revocation by either the intended husband or wife. Upon this objection the clause was struck out, and the deed was then again executed by the defendant, and a new attestation of execution was indorsed upon it; all the other parties then executed. It was objected, on the part of the defendant, that this deed could not be received in evidence for want of a new stamp, which it was said was requisite for the instrument, as it became a different deed by the alteration in striking out the clause. The learned Judge overruled the objection, but gave the defendant leave to move to enter a nonsuit.

The necessary parties met to execute a marriage settlement. Immediately after the conveying party had executed, and before the execution or assent by any other party, the father of the intended wife objected to a clause; the objection was acquiesced in, and the clause was struck out, and then the conveying party immediately re-executed, and the other parties executed:—*Held*, that the execution of the deed was in *ferri* only when the alteration took place, and that the alteration did not make a fresh stamp requisite.

Maule, in *Easter Term*, obtained a rule *nisi* to enter a nonsuit, against which cause was to have been shewn by *R. V. Richards*.

But the Court called upon—

Maule, in support of his rule.—The parties here came to a new agreement to alter the deed in a material point; in effect to make a different deed. It was not the correction of a mistake, in pursuance of the ori-

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ginal intention, but it was an alteration of the contract which had been prepared with their cognizance. It was to alter, not to carry into effect, the original intention. [Bayley, B.—May not the execution of the deed be considered to have been in *feri* only?] The defendant was the only conveying party, and after he had executed the deed, it is difficult to say that it was in *feri*. The trustees seldom execute at the time, even if they execute at all. There is no *locus pœnitentiæ* after delivering a deed absolutely. If a party executing a deed intends to have a *locus pœnitentiæ*, or that the deed should not have immediate effect, he should deliver it as an escrow, and not absolutely. This is not rectifying a mistake like that of *goods for ship*, in a policy of insurance, but it is a material alteration, which makes a different deed. The deed was perfect and complete, and had operation from the moment when the defendant, the only conveying party, executed it. Suppose he had died the next moment, his heir could not have taken. Would not the deed have had effect from that moment in case of a subsequent act of bankruptcy by the defendant or an *elegit* against him? It is submitted, that where an instrument has been executed, and might have been enforced against the party executing it, the stamp which was required becomes *functus officii*. *Schumann v. Weatherhead* (a).—[Bayley, B.—In that case there had been a perfect annuity granted, and the parties chose afterwards to make a new contract.] In *Hill v. Patten* (b), and *French v. Patten* (c), where a policy had been altered, without a fresh stamp, subsequently to its being effected, it was held that it could not be enforced either as it originally stood or as it was altered. *Reed v. Deere* (d) is in point.—[Bayley, B.—In that case I think the distinction was taken as to whether the agreement was in *feri*

(a) 1 East, 538.

(b) 8 East, 373.

(c) 1 Camp. 72.

(d) 7 B. & C. 261.

or complete, and it was held to be complete.] ——— v. *Exch. of Pleas,*
Lee (a) is expressly in point. There a deed was executed
 and altered by consent of parties, and then re-executed:
 and, *per Curiam*, this deed cannot be given in evidence as
 a new deed, unless it be stamped afresh, because the al-
 teration vacates the whole deed.

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BAYLEY, B.—I am of opinion that the rule for entering a nonsuit ought to be discharged. When we come to look at the facts of the case, it appears, that, although there was a formal delivery of the deed by the party executing, yet, in substance, it had not become so perfect a deed as to be incapable of alteration by the parties assembled. The deed was a marriage settlement, and the necessary parties to the execution were in attendance. The conveying party, the father of the intended husband, executes it, and before the ink is dry, and whilst all the parties were present, the person interested on behalf of the lady says, “I think that there is something objectionable in one of the clauses, and I wish it altered.” Then the parties consent, before the deed has passed into the hands of the parties who were to take under it, to have it rectified by striking out the clause in question, and the conveying party re-executes it. I think that the execution may be considered as in *feri* only whilst these circumstances happened, and that the new moulding the deed under the circumstances in question did not make a new stamp necessary. So very rigid a construction, as we are called upon to give to the stamp laws in this case, would render them a trap to innocent parties. These laws are intended to provide a revenue by requiring stamps when a deed is perfected; but to make it perfect, not only the delivery by the party conveying, but the acceptance by the party to take, is necessary. Now, here, before any such acceptance, the deed is

(a) Eq. Ca. Ab. 414. pl. 13.

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altered by the consent of all the parties assembled to execute. A party interested for a *cestui qui trust* says, that the deed is not what it ought to be; and he had a right to say, "we will not consent to the marriage going on, if you will not have the deed rectified." The short ground of my opinion is, that, at the moment of execution, an alteration was required by one party and acquiesced in by the other; and I think that the deed was not so far executed as to make a new stamp necessary.

VAUGHAN, B.—The question is, whether the execution of the deed was in *feri*, or whether it was *factum* and finished. On the facts stated, I am of opinion that it was in *feri* only. All the parties were assembled for the purpose of executing this deed. One party had just executed, and immediately on an objection being taken, and before the other contracting parties had executed, it is agreed to strike out the clause which had given rise to the objection; that was done accordingly, and the party re-executes, and the other parties execute. This must be considered, I think, as one transaction; and on the ground that there was no final consummation of the execution before the deed was altered, I am of opinion that a fresh stamp was not necessary.

The rest of the Court concurred, and the rule was—

Discharged.

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PICKIN v. GRAHAM and Another.

ASSUMPSIT by the indorsee of a bill of exchange against the drawers.

At the trial, before *Alderson, J.*, at the last Summer Assizes for the county of *York*, the question was, whether, under the circumstances; the defendants had dispensed with notice of dishonour. The bill was dated on the 26th of *April*, 1832, and had been drawn at one month's date, on a person of the name of *Wragg*, by one *Witham*, as the agent for the drawer, who had sold iron to the amount to *Wragg*. The bill was indorsed to a person of the name of *Jarvis*, and by him to *J. W. Potter*, an attorney in *Yorkshire*, where the parties all lived; and *J. W. Potter* subsequently indorsed it to the plaintiff. *Wragg* accepted the bill, and soon afterwards having got into difficulties, gave a bill of sale to his brother, which was prepared by *Potter*. On the 29th of *May*, the day on which the bill became due, *Potter* told *Jarvis* in *Yorkshire* that the bill would probably not be paid. *Jarvis*, in the course of the same day, sent an intimation to *Witham*, that he had heard from *Potter* that the bill would probably not be paid. On the 30th of *May*, *Witham*, who was the clerk and manager to the defendants, called at *Potter's* office, and told him that he had come in consequence of an intimation which he had received the day before of the expected dishonour of the bill accepted by *Wragg*. He said, "I suppose there will be no alternative but my taking up the bill, and if you will bring it to *Sheffield* next *Tuesday* I will pay you the money." On the *Tuesday* *Potter* met *Witham* at *Sheffield*, and he asked *Potter* if he had brought the bill: *Potter* said he had not, as it had not then come back. *Potter* received no notice of dishonour until the 9th of *June*, and the defendants received no notice of dishonour until the 11th of *June*, when they refused

The day after a bill of exchange had been dishonoured in *London*, and before the fact of the dishonour could be known in *Yorkshire*, the drawer's clerk called in *Yorkshire* upon the indorser prior to the holder. A conversation took place as to the bill being likely to come back, and the clerk said, "I suppose there will be no alternative but my taking up the bill, and if you will bring it to *Sheffield* on *Tuesday*, I will pay the money." The indorser did not receive either the bill or notice until some days after the *Tuesday*, and notice of dishonour was not given to the drawer in due time:—*Held*, that the promise did not dispense with giving due notice of the dishonour to the drawer.

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to pay. Upon this evidence the plaintiff was nonsuited, with leave to move to enter a verdict for the amount of the bill.

Pollock obtained a rule accordingly, against which cause was now shewn by—

J. Williams and Creswell.

Pollock and *Hoggins* were heard in support of the rule.

VAUGHAN, B.—This was an action upon a bill of exchange by the indorser against the drawer. The bill had been drawn for value by one *Witham*, as the agent of *Graham & Co.*, upon *Wragg*, to whom the drawer had sold iron to the amount of the bill. It was dated on the 26th of *April*, 1832, payable one month after date. The drawee accepted the bill payable in *London*, and it was indorsed to one *Jarvis*, and by him to a person of the name of *Potter*, who indorsed it to the plaintiff. The acceptor's affairs became embarrassed, and it appeared that, on the 29th of *May*, when the bill became due, it was understood in *Yorkshire* that *Wragg* was in bad circumstances, and it was intimated verbally that the bill would probably be dishonoured. This verbal intimation amounted to no more than this, that there had been a bill of sale of the acceptor's effects, and that the bill, therefore, probably would not be paid. The consequence was, that the defendants' clerk called on *Potter* on the morning of the 30th of *May*; the bill was payable in *London* on the 29th, so that it was impossible that notice of dishonour could have reached the parties in *Yorkshire* on the 30th. It is upon what occurred on the occasion of that call that the plaintiff founds his right to recover. It appears that there was a conversation between the defendants' clerk and *Potter* about the expected dishonour of the bill, and the clerk said to *Potter*, "If that be so, I suppose there is no alternative but for

me to pay the bill; if you will bring it to *Sheffield* next *Tuesday*, I will pay it." On the *Tuesday* following he saw *Potter* at *Sheffield*, and asked for the bill, and was told that it had not yet come back. There had been no notice to make *Potter* liable; for he received no notice until the 9th of *June*, and the defendants received no actual notice until the 11th of *June*, when they refused to pay. It was insisted, on the behalf of the plaintiff, that though the defendants had no notice, yet that they had knowledge, and with that knowledge promised to pay; and it was argued, that the general rule, that the drawer is entitled to notice of dishonour, may be waived by the party entitled to notice, and that a jury may infer, from a promise by him, that the notice was regular or was dispensed with. There is a wide distinction between notice and knowledge as applied to bills of exchange and promissory notes. In *Tindal v. Brown* (a), it was held, that notice means something more than knowledge. There are a variety of more recent decisions which establish that the requisite notice of dishonour of a bill of exchange is something more than mere knowledge. In *Baker v. Birch* (b), the acceptor went to the defendant, the drawer, and told him that he could not take up the bill, and that he, the drawer, must do so, and gave him *5l. 5s.*, which was all that he could raise for that purpose. The defendant received the *5l. 5s.*, and promised to take up the bill, yet he was held discharged from his liability upon the bill for want of due notice of dishonour. So, the bankruptcy, or known insolvency of the acceptor, furnishes no answer to the want of due notice of dishonour. *Esdaile v. Sowerby* (c), *Russel v. Langstaffe* (d). It is insisted, however, that in the present case there was a promise to pay. An absolute unqualified promise to pay, made by the drawer

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(a) 1 T. R. 167.
(b) 3 Camp. 107.

(c) 11 East, 113.
(d) 1 Dougl. 515.

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or indorser after the bill has become due, is no doubt evidence of a due presentment and notice. It imports that the notice and presentment have been regular; and juries have been properly directed to presume these facts from evidence of an absolute unqualified promise made after the dishonour of the bill. What passed in the present case, however, does not appear to me to amount to an absolute promise. The parties are talking of the expected dishonour of the bill, and the drawer, on the supposition that he had no other alternative but to pay, uses the expressions in question. I think that it was not at all like an absolute promise to pay the bill; it was rather the expressing an unwillingness to pay, with the fear that he should be compelled to pay. It is as if he had said, "I shall be sorry to be obliged to pay if it comes back, but I suppose I must; if you bring it on *Tuesday* I will pay it." The whole conversation imports not a promise to pay, but amounts in effect merely to this—"as the bill will probably come back, you must send it to me." There are numerous cases (*a*) which establish, that when a party promises to pay after the bill has been dishonoured, a regular notice and presentment will be presumed. It is unnecessary to do more than allude to this class of cases, which are of every day's occurrence. But in the case of *Borradale v. Lowe* (*b*), Lord Chief Justice *Mansfield*, in delivering his judgment, said: "I do not find any case in which an indorser, after having been discharged by the laches of the holder, has been held liable upon his indorsement, except where an *express* promise to pay the bill has been proved. Now the letter of the defendant contains no such *express* promise, but in a great measure shews that the defendant was writing under a supposition that he was liable." And in another part of his judgment the same

(*a*) See *Lundie v. Robertson*, 7 2 Camp. 105.
East, 231; *Gibbon v. Coggan*, (b) 4 Taunton, 93.
2 Camp. 188; *Taylor v. Jones*,

learned Judge said: "I cannot consider the letter as conveying an *absolute promise to pay at all events*, whether *Trevor & Co.* did or not; and I think in this case it would be too much to fix the defendant by any such implied promise. In most of the cases where the defendants have been held liable, they have either made an *express promise to pay*, or a *promise when they had a full knowledge at the time that they were discharged*." *Goodall v. Dolley (a)*, *Blesard v. Hirst (b)*, and other cases, establish that a promise made in ignorance of the circumstances of laches is not binding, and does not prevent the party from taking the objection. I am, therefore, of opinion that the present application to enter a verdict for the plaintiff must fail, and that the plaintiff was rightly nonsuited at the trial. It was admitted that this was no regular notice. Then, does the admission or promise suffice? I think clearly not; for the conversation took place before the dishonour could be known, and the promise was not an express, absolute, and unconditional promise, and did not, in my opinion, dispense with the want of notice of dishonour.

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BOLLAND, B.—I am of the same opinion. It is clear that *Potter* had not the bill at the time of the conversation, and the promise was manifestly confined to the case of the bill coming back to *Potter* in due course. He says, "I have no alternative, and I suppose I must pay it." It appears to me to amount only to this, "if the bill comes back to you in due course, I know my liabilities, and I must pay it." In *Prideaux v. Collier (c)*, the holder applied to the drawee, who said that he had no effects, but that the bill would not be due until the next day, and that effects would probably be provided before that time. On the next day, when the bill became due, the defendant (the drawer) told

(a) 1 T. R. 712.

(b) 5 Burr. 2670.

(c) 2 Starkie, N. P. C. 57.

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the plaintiff that he hoped the bill would be paid, that he would see what he could do, and would endeavour to provide effects. The bill was not presented until the day after it was due, and Lord *Ellenborough* held that the drawer was discharged.

GURNEY, B.—I am clearly of opinion that the promise in this case was not such a promise as would dispense with notice of dishonour.

Rule discharged.

CORFIELD v. PARSONS.

A person, on being sent by the defendant, an indorser of a bill of exchange, to the plaintiff, the indorsee, to inquire as to the solvency of *B.*, a prior indorser, went to the plaintiff's residence; and, on the street door being opened, a person in a dressing-gown, whom he had never seen before or since, asked him what his business was:—*Held*, not sufficient evidence of identity to let in evidence of the conversation.

It is a question for the Judge, and not a point for the consideration of the jury, whether the evidence

ASSUMPSIT on a promissory note by the second indorsee against the maker, for 16*l.* 10*s.* Plea, the general issue. At the trial before *Gurney, B.*, at the *Middlesex* sittings, in last *Easter* Term, the plaintiff obtained a verdict. The plaintiff was an attorney, residing and carrying on business in *Burton Street*, and had received the note from one Captain *B.*, who was a prior indorser; the plaintiff had given this person full consideration for the note. The defence set up was, that Captain *B.* had applied to the defendant to discount a bill for 50*l.*, on which there were three names of other persons, all of whom, including Captain *B.*, were at the time insolvent; and that Captain *B.* had referred the defendant to the plaintiff for information as to his solvency; and that the plaintiff had misrepresented Captain *B.*'s solvency. Captain *B.*, on being called by the defendant at the trial, swore that he had never given any such reference. The defendant, it appeared, discounted the 50*l.* bill for Captain *B.*, by giving him the promissory note on which the

of identity is sufficient in such case.

action was brought, and 14*l.* more in money and goods. A witness was called, on the part of the defendant, who swore that he was directed by the defendant, before the 50*l.* bill was discounted, to inquire of the plaintiff as to Captain *B.*'s solvency; that accordingly he went to plaintiff's residence, and, on the street door being opened, a person in a dressing-gown, whom he never saw before or since, asked him what his business was; to whom he mentioned the object of his calling there. The witness was asked by the defendant's counsel what this person said, which was objected to; and it was ruled by the learned Judge that, without shewing that this was the plaintiff, the question could not be asked. The plaintiff's clerk was called, who swore that he believed the plaintiff at the time in question was out of *London*, and that the plaintiff's brother often resided in the house, and wore a dressing-gown; he swore also that he (the clerk) was not the person in the passage. A rule *nisi* for a new trial having been obtained, on the ground that evidence of what this person at the the plaintiff's residence said, ought to have been received.

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W. H. Watson shewed cause.—Without shewing that this person in the dressing-gown was the plaintiff, or some person authorized by him to make these declarations, what this person said can be no evidence against the plaintiff; and there was no evidence to shew that the person in the dressing-gown was the plaintiff; on the contrary, all the evidence leads to the conclusion that he was not. He also contended, that the case for the defendant had failed on other points, and that this question had become immaterial.

White, contra.—The evidence was strong to shew that this was the plaintiff, and the declarations ought to have been admitted by the learned Judge; at all events, the

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question whether this was the plaintiff or not, ought to have been left to the jury. [Lord *Lyndhurst*, C. B.—Did you ever know an instance where a Judge stopped a cause to take the opinion of the jury as to the identity of a person, to make his declarations evidence?—Perhaps no precise case can be quoted to that effect, but the ordinary rule is, that all matters of fact are for the jury; and, as certainly there was *prima facie* evidence, it ought to have gone to the jury. Moreover, this person was attending at the house, and acting as the principal. What he did or said was evidence. In *Bulkeley v. Butler* (a), a person represented himself as the payee of a bill of exchange: he had the bill in his possession, and also a letter of introduction, and this was held sufficient *prima facie* evidence of his identity with the payee of the bill. [*Bayley*, B.—There he had possession of the bill.] In the present case, a person was found answering inquiries at the house, and it is submitted, that that is sufficient *prima facie* evidence that it was *Corfield*. The defendant was at liberty to go into the evidence, because the very answer might have shewn that it was *Corfield*. It is submitted, that the learned Baron ought to have received the evidence, and left it to the jury. [*Bayley*, B.—Whether the evidence was receivable or not was a question for the Judge, and he is to form his opinion whether the circumstances are sufficient to identify the party so as to warrant the reception of evidence of his declarations; and the Court has a right to see whether the evidence was reasonably sufficient to prove the identity, and whether the Judge was right in the opinion which he formed. Lord *Lyndhurst*.—It is not a point for the consideration of the jury, but a question for the Judge, whether there is sufficient evidence of identity.] There was a case not very dissimilar from the pre-

(a) 2 B. & C. 434.

sent, the case of *Barrett v. Deere* (a), where Lord *Tenterden* ruled, that payment to a person in the plaintiff's counting-house, and appearing to be intrusted with the conduct of the business there, was a good payment to the plaintiff, though it turned out that the person never was employed by him. [*Bolland*, B.—There the acts, not the declarations, of the person acting for the principal in the counting-house were held to bind him.]

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LORD LYNDEHURST, C. B.—It is attempted, in this case, to make statements of a person who appeared at the plaintiff's house, to be evidence against him; but, in order to make such statements or declarations evidence against the plaintiff, the defendant, in the first instance, was bound to give reasonable evidence to satisfy the learned Judge that this person was the plaintiff. It is said that the learned Judge should have left the question of identity to the jury; I have never known a case where such a course was adopted: I have always understood, and I think it convenient that it should be so, that the whole matter, as to the grounds for the admissibility of evidence, rests with the Judge; I therefore think that this evidence was properly rejected.

BAYLEY, B.—Declarations to affect a party must be shewn to have been made by him, or by his authority. Here, no such evidence was given; it did not appear *prima facie* that this person, at the plaintiff's house, was the plaintiff, if so it might have been left with the whole case to the jury. But I think the admissibility of this evidence, involving the question, whether or not this person was the plaintiff, was a question for the Judge. The case of *Bulkeley v. Butler*, is a distinct authority, that whether the evidence ought to be received or not is a question for

(a) M. & M. 200.

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the Judge. The case of *Barrett v. Deere* does not apply. There the payment of money to a person in the plaintiff's counting-house, ostensibly transacting his business, was held a good payment; but that case does not shew that the declarations of such a person would have been evidence; I therefore think this evidence was properly rejected.

BOLLAND and GURNEY, Bs., concurred.

Rule discharged.

DENTON v. RICHMOND.

Covenant on an indenture of lease whereby the tenant covenanted to pay the rent of 50*l.* half-yearly, and, over and above the reserved rent, the further yearly rent of 5*l.* for every acre of the demised premises which the defendant should convert into tillage, over and above one-third part thereof. Breach assigned for over tillage, whereby defendant became liable

COVENANT on an indenture, dated the 26th *February*, 1825, made between the plaintiff of the one part, and the defendant of the other part, by which the plaintiff demised, leased, set, and to farm let, unto the said defendant, his executors, &c., a messuage and certain lands in the said indenture mentioned: To hold the same to the defendant, his executors, &c., for the term of ten years, with liberty for him, the said defendant, his executors, &c., to plough, till, and crop all the said land, in such manner as he should think proper, for the first seven years of the said term thereby demised; and liberty for him, the said defendant, his executors, &c., for the remainder of the said term, to plough, till, and crop the said lands, in such way

to pay 75*l.* additional rent. Pleas, *first*, That, after the committing of the supposed breaches of covenant, the plaintiff, with a full knowledge of the supposed breaches of covenant, accepted and received from the defendant 25*l.*, as and for all the rent due, in respect of the premises, up to and inclusive, &c., (covering the time alleged in the breach), without demanding or requiring the payment of such penalty or additional rent, and thereby then and there waived, gave up, and dispensed with his right to receive or recover any *nomine pœnæ*, or penalty, or such additional rent. *Secondly*, That, after the committing of the breaches of covenant, the plaintiff, with a full knowledge, &c., waived, gave up, and dispensed with all claim or right on his part to receive, recover, or be paid any such penalty, *nomine pœnæ*, or additional rent. On a general demurrer both pleas were held insufficient.

as he might think proper ; but *it was reserved that not more than one-third of the said land, or as nearly one-third as the different sizes of the closes would admit, should be in cropping in any one year ;* and it was provided, that the said lands that should be so converted into tillage, should, the first year, be cropped with green coleseed, and afterwards might have two succeeding crops of grain, and then laid down with two bushels of rye grass and five pounds of clover on each acre : yielding and paying yearly, and every year during the said term thereby demised, unto the said plaintiff, his heirs and assigns, the yearly rent of 50*l.*, by equal half-yearly payments, on the 6th of *April* and the 11th of *October* in each year, clear of all deductions whatsoever, the first payment thereof to be made on the 6th day of April then next; and also yielding and paying, over and above the aforesaid reserved rent, unto the said plaintiff, his heirs and assigns, *the further yearly rent or sum of 5*l.* for every acre, and so in proportion for a greater or lesser quantity than an acre of any part of the said premises, which the said defendant, his executors, &c., should, at any time or times, during the said term, plough, crop, break up, or convert into or continue in tillage, or manage otherwise than according to the liberties and reservations contained in that indenture, without the consent of the plaintiff, his heirs or assigns, first had or obtained in writing for that purpose, such increased rent, and payment (if any should become due and payable) to be paid at the first of the before-mentioned half-yearly days of payment, which should happen after such ploughing, cropping, breaking up, converting into or continuing in tillage, contrary to the liberties aforesaid, and should continue payable during such parts of the remainder of the said term as the same should continue to be so cropped, ploughed, or converted into or continued in tillage, contrary as aforesaid ; and the defendant thereby covenanted to pay the yearly rent of 50*l.*, and also the*

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said *increased* rent (if any should become due and payable) at the times and in the manner aforesaid. (The declaration then set forth other covenants, for repairing the demised premises, &c., upon which no question arose, and then proceeded as follows): By virtue of which demise, the defendant afterwards, &c., entered into and upon all and singular the said demised premises, with the appurtenances, and became and was possessed thereof for the said term, so to him thereof granted as aforesaid; and although the plaintiff hath always, from the time of the making of the said indenture hitherto, well and truly performed all things in the said indenture contained on his part and behalf to be performed, fulfilled, and kept, according to the true intent and meaning of the said indenture, to wit, at &c., yet, protesting, &c., the said plaintiff saith, that, after the making of the indenture, and during the term thereby granted, and after the expiration of the first seven years, to wit, after the 11th *October*, 1831, and whilst the said defendant was so possessed of the demised premises, with the appurtenances, the defendant, without the consent in writing of the plaintiff first had and obtained, in one and the same year, viz. in the year between the 20th of *October*, 1831, and the 20th of *October*, 1832, and before the 6th of *April*, 1832, to wit, on &c., did plough, crop, and break up, above, beyond, and considerably more than one-third of the said land, by the said indenture demised, and above, beyond, and considerably more than one-third thereof, calculated as nearly as the different sizes of the closes would admit of, to wit, thirty acres above, beyond, and more than one-third of the said land so demised as aforesaid, contrary to the liberties and reservations in the said indenture contained; by means whereof the defendant, according to the form and effect of the indenture, became liable to pay to the plaintiff, on the 6th of *April*, 1832, being the first of the half-yearly days of payment which happened after the ploughing, cropping, and break-

ing up of the lands aforesaid, a certain large sum of money, to wit, 75*l.*, being one half-yearly payment of additional rent, for or in respect of the said acres, to wit, the said thirty acres above, beyond, and more than one-third of the said land demised, so ploughed, cropped, and broken up as aforesaid, calculated at and after the rate of 5*l.* *per annum* for every such acre, to wit, at &c. Breach—in non-payment of the 75*l.* additional rent.

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There was another breach for keeping and continuing cropped and in tillage thirty acres above one-third of the land, calculated as nearly as the different sizes of the closes would admit, *after the 6th of April* until and after the 11th of *October, 1832*.

There then followed various breaches for not repairing.

Pleas.—First, as to so much of the declaration as relates to the supposed breaches of covenant, firstly and secondly assigned, that, after the committing of the supposed breaches of covenant, and of all matters and things in the declaration, so far as it related to the supposed breaches, and before the exhibiting of the bill, to wit, on the 2nd of *November, 1832*, the plaintiff, with a full knowledge of the supposed breaches of covenant, and of all matters in the declaration, so far as related to those breaches respectively mentioned and alleged, accepted and received of and from the said defendant a certain sum of money, to wit, 25*l.*, *as and for all the rent due* for or in respect of the said premises, up to and inclusive of the 11th of *October, 1832*, *without demanding or requiring the payment of such penalty or additional rent* as in the first and second breaches mentioned, or any part thereof, *and thereby then and there waived, gave up, and dispensed with his right to receive or recover any nomine pœnæ or penalty, or such additional rent as in those breaches mentioned, or any part thereof.*

Secondly, That, after the committing of the supposed

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breaches of covenant, &c., and before the exhibiting of the bill, to wit, on &c., the plaintiff, with a full knowledge that the defendant had committed the supposed breaches of covenant, to wit, on &c., *waived, gave up, and dispensed with all claim or right, on his part, to receive, recover, or be paid any such penalty, nomine pœnæ, or additional rent, as in those breaches respectively mentioned, or any part thereof.* General demurrer to both pleas, and joinder in demurrer.

Channell, in support of the demurrer.—There is no substantial difference between the two pleas; but, as the first goes somewhat farther than the second, if the former cannot be supported, the latter clearly cannot. The first plea is bad. It is not good as a plea of payment. Nor is it good as a plea of accord and satisfaction, since it does not answer the whole declaration, and it is not stated that the plaintiff accepted the 25*l.* by way of satisfaction. In *Thomas v. Heathorn* (a), where the damages in the declaration were laid at a sum larger than that to which the plea applied, for which amount a bill had been drawn, and which the defendant accepted on account of the promises in the declaration, *the plea was held bad, inasmuch as it was pleaded to the whole demand*; and it was held, that, as it was pleaded by way of satisfaction, it ought to have answered the whole declaration. The plea must be good, if at all, on the ground that the additional rent is so far in the nature of a penalty that it is waived by the reception of single rent. The question therefore is, whether this is a penalty, or whether it is not to be considered as liquidated damages? Now it clearly is not a penalty, at least in the sense the defendant must contend for. In a court of law, the full amount is recoverable as an agreed sum, or as stipulated damages, and in a court of equity relief will not be afforded against the payment. In a court of law the full amount may be

(a) 2 B. & C. 477.

recovered. *Farrant v. Olmius* (a). Then as to equity, *Rolfe v. Peterson* (b), is in point. That case arose upon a covenant to pay additional rent in case the ancient meadow lands were ploughed up, or if any part of the arable lands should be ploughed or sowed out of course, contrary to the meaning of the indenture and the covenants therein contained. There the argument was, as it will be here to-day, that this increased rent was to be considered as a penalty; and that although a court of law is bound by a penal covenant, a court of equity could relieve against it. But the Court decided otherwise. [Lord *Lyndhurst*.—It was decided also in Lord *Hardwicke's* time.] Yes, and those cases were cited and confirmed in *Aylet v. Dodd* (c). That was the case of an annuity chargeable on lands; and payment of the annuity was secured by a *nomine pænæ* of 5s. *per week*. The Court there took the distinction between the case where a *nomine pænæ* is reserved for the non-performance of certain acts, for instance, the appointment of a schoolmaster, and where it is reserved in leases to prevent a tenant from ploughing. In the first case, it stands as a security only for the damage sustained; but Lord *Hardwicke* says, "Where there is a clause of *nomine pænæ* in a lease to a tenant, to prevent his breaking up and ploughing old pasture ground, it is otherwise; for, the intention of it there is to give the landlord some compensation for the damage he has sustained, from the nature of the land being altered; and therefore, in that case, the whole *nomine pænæ* shall be paid." In *Benson v. Gibson* (d) the same distinction is preserved. Lord *Hardwicke* says, "I cannot decree this penalty here, because this is a bond for services only, and different from a *nomine pænæ* in leases to prevent a tenant from ploughing, because] that is the stated

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(a) 3 B. & A. 692.

(c) 2 Atkins, 238.

(b) 2 Brown's Parl. Cases, 436.

(d) 3 Atkins, 395.

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damages between the parties." And in *Woodward v. Gyles* (a) it is said, "The parties themselves have here agreed the damage, and have set a price for ploughing, and therefore we will not grant any injunction; and declared if the defendant was plaintiff against paying 20*s.* *per* acre for ploughing, they would not relieve him." In *Jones v. Green* (b), where, by the original lease, the tenant covenanted not to sow, during the last three years, more than seventy acres in one year with clover, or, if he did so, to pay an additional rent of 10*l.* for every acre above seventy acres, for the residue of the term, in the same manner, and at the same time that the annual rent was to be paid and payable; it was held, that, although the several terms, "penalty," "compensation," and "additional rent" were used in the lease, yet that, according to the rule of construction, it was not to be considered as a penalty, so that the defendant would be protected from answering, but as stipulated damages, or as additional rent, and therefore that the plaintiff was entitled to a discovery. In *Lowe v. Peers* (c), which was an action of a different nature, Lord Mansfield, in illustrating the principle, refers to cases of lands ploughed up, and says, "As in leases containing a covenant against ploughing up meadow, if the covenant be 'not to plough,' and there be a penalty, a court of equity will relieve against the penalty, or will even go farther than that to preserve the substance of the agreement; but, if it is worded to pay 5*l.* an acre for every acre ploughed up, there is no alternative, no rule for any relief against it; *no compensation*; it is the substance of the agreement; it is the particular liquidated sum fixed and agreed upon between the parties, and is therefore the proper quantum of the damages." A court of equity therefore will not relieve, and as to the construction to be put upon such a con-

(a) 2 Vernon, 119. (b) 3 Y. & J. 298. (c) 4 Burr. 2229.

tract by a court of law, *Farrant v. Olmius* (a), is decisive. There Lord *Tenterden* had directed the jury to find a verdict for the increased rent, but they gave, by their verdict, a compensation for what they considered to be the actual damage sustained. The Court granted a new trial on the ground, that, in point of law, they ought to have given the increased rent. The 75*l.* in the present case, therefore, must be considered either as additional rent or stipulated damages, and in either view it could not be waived by the acceptance of the ordinary rent.

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F. Kelly, contra.—It was originally thought that these contracts were in the nature of a penalty, and not contracts for a specific rent, although it is now held that the landlord in such case is entitled to the whole as liquidated damages. But the question here does not depend upon that principle. This is to be looked upon as an amount of rent, which the landlord may forego, and waive his right to by his own act. Then has he in fact waived his right to this additional rent? That depends on the language of the pleas: the words in the first plea are “accepted and received of and from the said defendant a certain sum of money, to wit, 25*l.*, as and for all the rent due for or in respect of the said premises, without requiring payment of such additional rent.” As the present is an action of covenant to recover damages, the verdict can only be for damages, and it is not in the nature of debt for a specific sum. If the plea had alleged that the 25*l.* was received in satisfaction, issue might have been taken on that allegation, and the jury would have been justified in finding that it was. In substance this amounts to a plea of satisfaction; and as the defect is only in form, there should have been a special demurrer. [Lord *Lyndhurst.*—As I read this plea, there is no satisfaction, even by construction, as to this additional rent—the words are :

(a) 3 B. & A. 692.

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“ that the plaintiff accepted and received 25*l.* as and for all the rent due, without demanding or requiring the payment of such penalty or additional rent.” According to this he abandoned the additional rent; the plea does not say that it was satisfied; he received the original rent only.] It may be taken on the general words as an acknowledgment of the receipt of all sums due. [Lord *Lyndhurst*.—The plea having reference to the words of the covenant, and the declaration distinguishing between the original rent and the additional rent, how can it be in satisfaction of the additional rent? The original rent was received, the additional rent was not]. A man being entitled to two sums for rent, receives 25*l.* as for all the rent due, is not that a satisfaction of both?

LORD LYNDHURST, C. B.—It appears to me that the two pleas are in effect similar, and amount to pleas of waiver. Considering them as pleas of waiver of the additional rent, how can it be contended that a party having a right to recover a sum of money as stipulated damages and as additional rent, can waive it by receiving another sum due for the original rent? If it were a forfeiture it might be waived. If it is a sum due in respect of liquidated damages it cannot be so waived. Where a party has a right to recover an amount from another, and gives it up by matter *in pais*, that does not amount to a discharge; nor is it satisfaction.

VAUGHAN, B.—There is a very elaborate judgment of Lord *Eldon's* in *Astley v. Weldon* (a), where the distinction between a case of a penalty and one of stipulated damages is fully elucidated.

Judgment for the plaintiff.

Kelly afterwards obtained leave to amend on payment of costs.

(a) 2 Bos. & Pull. 350.

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DETINUE for a gelding. Plea—*actio non*, because he says that the said gelding, in the said declaration mentioned, was on the day and year aforesaid delivered by the plaintiff to the defendant to be stabled and taken care of, and fed and kept by the defendant for the plaintiff for remuneration and reward, to be paid by the plaintiff to the defendant in that behalf. And the defendant in fact further saith, that afterwards, and before and at the time of the commencement of this action, to wit, on the 16th day of *March*, 1833, in the county aforesaid, the plaintiff became and was indebted to the defendant in a large sum of money, to wit, the sum of 10*l.*, being a reasonable and fair remuneration and reward in that behalf, for and in respect of the defendant having before then stabled and taken care of, and fed and kept, the said gelding for the plaintiff, under and by virtue of the said delivery and bailment. And the said defendant in fact further saith, that the said sum of 10*l.* is still due and owing to the defendant. And for which reason he the defendant hath, from the time of the delivery of the said gelding, hitherto detained and still detains the same, as he lawfully may, for the cause aforesaid. General demurrer and joinder.

To a count in detinue for detaining a horse, the defendant pleaded that the plaintiff had delivered the horse to him to be stabled and taken care of, and fed and kept by him for the plaintiff, for reward; and that 10*l.* became due to him from the plaintiff as a reasonable reward, and so justified the detainer for that sum:—*Held*, on general demurrer, that the plea was bad, and that a person to whom a horse was so bailed had no lien.

Mansel, in support of the demurrer.—This plea states merely a bailment of the gelding to be stabled and taken care of, and fed and kept. The defendant does not clothe himself with the character of an innkeeper, or even with that of a livery-stable keeper, nor does he shew any express contract for a lien. A livery-stable keeper has no lien, except by special contract. *Wallace v. Woodgate (a)*, in which case *Best*, Chief Justice, laid down expressly that

(a) *Ryan & Moody*, 193; 1 *Car. & P.* 575.

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a livery-stable keeper had not, by law, a lien for the keep of horses, unless by special agreement with the owner of them. In *Yorke v. Grenaugh* (a), which is the principal case on the subject, *Holt*, C. J., clearly considered a livery-stable-keeper as having no lien; for he says, "Now that is rather the business of a man that keeps livery-stables than of an innkeeper." It cannot be pretended, that, in this case, the defendant was compellable to receive the horse, and that is the ground of the right to lien. Innkeepers, hostlers, and persons taking upon themselves such public engagements, were compellable to receive guests and their horses. *Watbroke v. Griffiths* (b), *Gully v. Clarke* (c), and *Bacon's Ab. tit. "Inns and Innkeepers, (C) 3*.

He was then stopped by the Court.

Erle, contra.—The plea is good in point of law. The defendant does not rely on any lien arising out of his being compellable to receive the horse; but on the general principle, that every person who has spent money or employed his labour on a chattel for remuneration by the owner, has a lien on the chattel for such remuneration. This principle was acted on in *Ex parte Deese* (d), which was the case of a packer; and in *Franklin v. Hosier* (e), which was the case of a shipwright; and in *Chase v. Westmore* (f), which was the case of a miller; and in which the subject was considered with great attention. [Lord *Lyndhurst*, C. B.—In the case of cattle taken in to agist, there is no lien.] That was so decided in *Chapman v. Allen* (g), which case was commented upon by Lord *Ellenborough* in *Chase v. Westmore*. The modern doctrine of lien is much more extensive than it appears to have been considered in the time of Lord Chief Justice *Holt*; and it is now settled, that

(a) Lord Raymond, 868.

(b) Moore, 877.

(c) Id. 878.

(d) 1 Atk. 228.

(e) 4 B. & A. 341.

(f) 5 M. & S. 180.

(g) Cro. Car. 271.

every artificer or workman who bestows labour upon a particular chattel for reward, has a particular lien on such chattel. The old doctrine of the lien arising from the artificer being compellable to receive the article, clearly would not have applied to many of the cases in which it has been held that the bailees have a lien. In *Chase v. Westmore*, it was held that a miller had such a lien, although there had been an express contract for the price, which, according to some old authorities there cited, would have excluded the lien. In *Bevan v. Waters* (a), it was decided that the trainer of a race horse had a lien, as he was a bailee who bestowed his labour upon the chattel bailed to him. The same point was decided in *Jacobs v. Latour* (b), where *Best, C. J.*, had decided at *Nisi Prius* that a trainer had a lien in a race horse delivered to him to train. [*Lord Lyndhurst, C. B.*—That case is a decided authority against you. The learned Judge, who decided that the trainer had the lien, expressly draws the distinction between a trainer and a livery-stable keeper. *Lord C. J. Holt*, and the rest of the Court in *Yorke v. Grenaugh*, were clearly of the same opinion; and it was not merely the *dictum* of the Chief Justice, but it involved the whole general question in dispute; for why should they have entertained the question, as to whether the person who left the horse was a guest or no, if they had not been of opinion, that, as a livery-stable keeper only, he had no such right as that contended for?] The real principle upon which it has been thrown out, in several cases, that a livery-stable keeper has no lien, is on account of the nature of the contract, by which the bailee is to redeliver the horse from time to time as he may be wanted; and that was the view taken by the counsel in argument in *Jacobs v. Latour*. Where it appears that there is such a contract as that the bailee is to redeliver to the bailor, from time to time, as he may have occasion to use the article, it may be difficult to maintain the right of lien,

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(a) M. & M. 236.

(b) 2 M. & P. 201; S. C. 5 Bing. 130.

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but here no such contract appears to have existed. The plea does not shew that the defendant was a livery-stable keeper, who might, perhaps, by agreeing to redeliver from time to time, as the bailor has occasion for the animal, give up the right of lien, which he would otherwise have had from bestowing his labour upon the animal. This plea clearly shews that the animal was to have labour bestowed upon him, as much as in the care of the trainer. The words are, "to be stabled and taken care of, and fed and kept." These words clearly shew that labour was to be bestowed; and it is submitted that the present case falls within the general principle, that a bailee, who bestows his labour upon a chattel for reward from the bailor, has a right of lien until that reward is paid.

Lord LYNTHURST, C. B.—The question is on the sufficiency of the plea. Now, the plea states, that the horse was delivered by the plaintiff to the defendant, to be stabled and taken care of, and fed and kept by the defendant for the plaintiff, for remuneration and reward, to be paid by the plaintiff to the defendant in that behalf; it then states, that the plaintiff became indebted to the defendant in the sum of 10*l.*, being a reasonable and fair remuneration and reward, for and in respect of the defendant having stabled and taken care of, and fed and kept the horse under and by virtue of the said delivery and bailment; and so justifies the detention until that sum should be paid. Upon this plea the question is, whether, on the state of facts disclosed, the defendant has or has not a lien upon the horse; I am of opinion that he has no lien. The present case is distinguishable from the cases of workmen and artificers, and persons carrying on a particular trade, who have been held to have a lien, by virtue of labour performed in the course of their trade, upon chattels bailed to them. The decisions on the subject seem to be all one way. In *Chapman v. Allen*, it was decided that a person receiving cattle to agist had no lien. In *Yorke v. Gre-*

naugh, it was held, not merely by Lord Chief Justice *Holt*, but by the whole Court in their decision, that a livery-stable keeper had no lien. As to the case of *Jacobs v. Latour*, that, so far from establishing the right of lien, confirms the former decisions; for Lord Chief Justice *Best* expressly draws the distinction between a trainer, who bestows his skill and labour, and a livery-stable keeper—between horses taken in by a trainer and altered in their value by the application of his skill and labour, and horses standing at livery without such alteration. When the case came on before the Court of *Common Pleas*, that distinction seems to have been supported. It appears to me, therefore, that the present case is decided by the concurrence of all the authorities.

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VAUGHAN, B.—I am of opinion, that it is clear, from the authorities on this subject, that the present defendant had no right to detain the horse in question, and consequently that our judgment must be for the plaintiff.

BOLLAND, B.—In deciding against the right of lien in this case we break in upon no former decisions. Admitting that a trainer has a lien, it must be on the ground that he has done something for the benefit and improvement of the animal. The doctrine might, perhaps, be extended further so as to embrace the case of a breaker, into whose hands a young horse is placed to be broken in. The breaker makes it a different animal. The chattel is improved by the application of his labour and skill. In the present case it does not appear that any thing was to be done to the animal to improve it or render it a different animal by the application of the skill and labour of the bailee.

GURNEY, B. concurred.

Judgment for the plaintiff.

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REAY and Another v. WHITE and Another.

Action against the defendants as acceptors of a bill of exchange for 1039*l.* It appeared that the defendants owed the plaintiffs a balance of 321*l.* That the defendants failed, and their creditors, amongst whom were the plaintiffs, agreed to take a composition of 5*s.* in the pound on their debts, by notes at four and eight months. There was a dispute as to the balance due to the plaintiffs, and they promised to adjust their account with one of the defendants, and said they would do as the other creditors did. The defendants insisted for some time that 250*l.* 9*s.* 7*d.* was the balance due, but the defendants' attorney afterwards called on the plaintiffs' attorney and told him that the defendants were ready to pay the composition on 321*l.*, the sum really due, but the plaintiffs' attorney refused, and said they must have the whole. No actual tender was made of the notes or of cash for the amount of the composition:—*Held*, that a tender was not necessary under the circumstances, and that the plaintiffs could only recover the amount of the composition on the balance.

THIS was an action against the defendants as acceptors of a bill of exchange for 1039*l.*, dated 30th November, 1830, drawn on them by the plaintiffs, payable at three months' date to the plaintiffs' order. The declaration also contained counts for goods sold and delivered, the usual money counts, and an account stated. At the trial before Lord Lyndhurst, C. B., at the London Sittings after Hilary Term, 1833, it appeared that the plaintiffs sought to recover from the defendants a sum of 321*l.*, alleged to be due on balance of account between the parties. For the defence it was shewn, that the defendants, who were wine brokers, stopped payment in June, 1831; shortly after which time a meeting of their creditors took place, at which it was agreed, that the creditors would accept a composition of 5*s.* in the pound on their debts; and an agreement, dated 11th July, 1831, was prepared, which was signed by the plaintiffs, whereby the creditors agreed to accept 5*s.* in the pound in discharge of their debts, by notes at four and eight months. A clerk of the defendants was employed to prepare a statement of their accounts with the different creditors. He drew out an account between the plaintiffs and defendants, and took it to the plaintiffs, making a balance of 250*l.* 9*s.* 7*d.* due to the plaintiffs. The plaintiffs did not agree to the amount, but said they would arrange it with the defendant White. At subsequent interviews which the defendants' clerk had with the plaintiffs in July and August, 1831, in order to an adjustment of the account, the plaintiffs said they had agreed to do as the other creditors did, and would do so. It further appeared that the composition had been paid to and received by all the creditors of the defendants, except the plaintiffs, and that a release to the defendants was subsequently prepared, whereby the creditors released

them from their debts; and such release had been executed by all the creditors except the plaintiffs. It also appeared, that before the action was brought, and in consequence of a letter which the defendants had received from the plaintiffs' attorney, demanding payment of the acceptance on which the action was brought, the defendants' attorney called upon the latter, and told him the defendants were ready to pay the composition as soon as the balance was agreed, but that the balance had not been agreed. The plaintiffs' attorney said, that the sum claimed was 321*l.*; on which the defendants' attorney said, that the defendants were ready to pay 5*s.* in the pound on that sum; but the plaintiffs' attorney said, that the plaintiffs would not take less than the whole amount. No evidence was given that the defendants had tendered to the plaintiffs notes or cash for the amount of the composition, either on the balance of 321*l.* claimed by the plaintiffs, or on the sum of 250*l.* 9*s.* 7*d.*, which, according to the account made out by the defendants' attorney, was the balance due. Under these circumstances, Lord *Lyndhurst* left it to the jury to say, whether the sum of 321*l.*, or 250*l.* 9*s.* 7*d.*, was due to the plaintiffs on the balance of account; and the jury found the balance to be 321*l.*, upon which a verdict was entered for the plaintiffs for that amount, leave being given to the defendants to move to reduce the verdict to the amount of the composition.

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Andrews, Serjt., in the *Easter* Term following, accordingly obtained a rule *nisi* to that effect.

R. V. Richards, and *Charles R. Turner*, shewed cause.—The composition agreed to be taken by the creditors was to have been paid by notes of the defendants at four and eight months; and the question is, whether, as the defendants did not pay the composition at the time stipulated, the latter are not remitted to their original rights?

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The rule is, that the person to be discharged is bound to do the act which is to discharge him: it was the duty of the defendants in this case to pay the plaintiffs the notes for the composition, according to the agreement with the creditors; and, as they did not do so, the plaintiffs are entitled to sue for their original debt. *Cranley v. Hilary* (a) is in point. In *Shipton v. Casson* (b), the bills for the composition were remitted after the period limited for payment of it had expired; but that case is distinguishable from the present, inasmuch as there the plaintiffs accepted and kept the remittance, which was held to be a waiver of the default, but here there never was a payment, nor a tender of payment. [Lord *Lyndhurst*, C. B.—There was a controversy about the balance; the plaintiffs did not agree to the amount as made out by the defendants, but said they would arrange it with one of the defendants.] It is no answer on the part of the defendants to say, that the amount of the balance was not agreed upon; the debtor must take notice at his peril of what he owes. The plaintiffs claimed 321*l.*, and the verdict establishes that that was the true balance due to them. Upon that balance, therefore, the defendants were bound to pay, or at least to tender the notes within the time stipulated by the agreement; here they do neither one nor the other; nor, even after the time stipulated, do they do any thing which amounts to a tender. All that passes is, that the defendants' attorney said that the defendants were ready to pay the composition on the 321*l.*, but that does not amount to a tender. *Thomas v. Evans* (c). [Lord *Lyndhurst*, C. B.—Did he not say, the defendants were ready to pay as soon as the balance was agreed? The objection to pay all along was, that the account was not adjusted; it was as much the plaintiffs' duty as the defendants', to adjust the account. At last the defendants' attorney

(a) 2 M. & S. 120. (b) 5 B. & C. 378. (c) 10 East, 101.

agreed to pay on the footing of the plaintiffs' account.] There never was any intention to make a tender of the composition for the balance on the footing of the plaintiffs' account.

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Andrews, Serjt., and *Hoggins*, *contra*, were stopped by the Court.

LORD LYNTHURST, C. B.—It was proved, that the plaintiffs agreed, when the account should be adjusted, to take the same rate of composition as the other creditors had agreed to take. The account was rendered, and was in controversy. Many applications were made to the plaintiffs and their agent to settle it, but they never did so. Before the action was brought, the defendants offered to pay a composition on 321*l.*, but this was refused. Under these circumstances, it was not necessary that the defendants should have produced and tendered the bills, and I am of opinion, therefore, that the verdict ought to be reduced.

BAYLEY, B.—I also think that the verdict ought to be reduced. The question is not between the plaintiffs and the defendants, but between the plaintiffs and the other creditors. The object of the arrangement was to make the defendants new men, and the other creditors have an interest to see the agreement carried into effect. There is a distinct undertaking by the plaintiffs, that they will do as the other creditors have done; whereas, they claim the whole of the 321*l.*, when they are only entitled to a dividend upon it. I admit that there was no strict tender; but I think that the plaintiffs, by their conduct, dispensed with a tender, and thus the case is as if a sufficient tender had been made.

VAUGHAN, B.—The defendants have done all that the

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circumstances imposed upon them. The account was to be adjusted; the defendants were ready to adjust it, and the case of *Jones v. Barkley (a)*, shews that where one party is ready to do what is to be done by him, and the other party dispenses with his doing so, it is not necessary that a strict tender should be proved.

BOLLAND, B., concurred.

Rule absolute, to reduce the verdict to
80*l.* 9*s.* 4*d.*

(a) 2 Dougl. 684.

MULLETT and Another v. HUNT.

An action will lie against a witness for non-attendance in pursuance of a *subpoena*, although the plaintiff was not nonsuited, but withdrew his record in consequence of the absence of the witness.

In a declaration in case for not attending as a witness in pursuance of a *subpoena*,

CASE for not attending as a witness in pursuance of a *subpoena*.

The declaration stated, that the plaintiffs, before the committing of the grievance thereafter mentioned, to wit, in *Easter Term*, in the second year of the reign, &c., in the Court of our lord the King, before the King himself, at *Westminster*, commenced and prosecuted a certain action against one *John Hewitt*, in a plea of trespass on the case upon promises, and such proceedings were thereupon had in the said court, &c., that a certain issue before

poena, there was no distinct allegation of a good cause of action in the original suit; but it was stated that the defendant could have given material evidence for the plaintiff, and that without his evidence the plaintiff could not safely proceed to trial, and that by reason of his non-attendance, and because the plaintiff could not safely proceed to trial without his testimony, he was forced and obliged to, and did withdraw the *Nisi Prius* record:—*Held* sufficient after verdict.

The same declaration alleged, that the *subpoena* was made known and shewn to the defendant. The evidence was, that the *subpoena* was made known, and conduct money was taken by the witness, but the original *subpoena* was not shewn:—*Held*, that it was not necessary for the purposes of such action that the original *subpoena* should be shewn, (unless, perhaps, where the party demanded to see it), and that the part of the allegation as to shewing the *subpoena* might be rejected.

A witness who was subpoenaed by the plaintiff in an action for use and occupation, and could have given evidence as to the use and occupation, and could also have rebutted a set-off which was expected to be insisted on as a defence, did not appear in pursuance of his *subpoena*. There was another witness as to the use and occupation. When the cause was called on, the counsel on both sides were absent. The attorney for the plaintiff proved that he could have handed over the draft brief to other counsel who were in attendance, and that he withdrew the record solely on account of the absence of the witness who did not appear:—*Held*, that the witness was liable in an action for not appearing in pursuance to his *subpoena*.

then joined in the said action between the said parties, was about to come on for trial at the sitting of *Nisi Prius*, holden at *Westminster Hall*, in the county of *Middlesex*, on the 7th *November*, A. D. 1832, before the Right Honourable Sir *Thomas Denman*, Knight, Chief Justice, and by a jury of the country then and there chosen for that purpose, to wit, in the county of *Middlesex*. That, before the trial of the said issue, and also before the committing of the grievances thereafter mentioned, to wit, on the 13th *November*, 1832, aforesaid, the plaintiff prosecuted out of the said Court, &c., his Majesty's writ of subpœna, directed to *Pierre Victor Saint Marc*, the said defendant, and *John Mullett*, by which said writ our said lord the King commanded them and every of them, that all other things set aside, and ceasing every excuse, they and every of them should be and appear in their proper persons, before his Majesty's right trusty and well-beloved the said Sir *Thomas Denman*, Knt., his Majesty's Chief Justice, &c., &c., at *Westminster Hall*, in the county aforesaid, on *Tuesday*, the 27th *November*, then instant, by nine of the clock in the forenoon of the same day, and so from day to day, until the said cause should be tried, to testify the truth, according to their knowledge, in a certain action then in the said Court of our said lord the King, before the King himself, pending between the said plaintiffs and the said *John Hewitt*, on the part of the plaintiffs, &c., &c.; which said writ the said plaintiffs afterwards, and before the committing of the grievance thereafter mentioned, to wit, on the 14th *November*, in the year aforesaid, caused to be *made known to and shewn* to the said defendant, and then and there caused a copy to be left with the said defendant, of so much of the said writ of subpœna as related to the said defendant, and then and there paid to the said defendant a certain sum of money, to wit, the sum of one guinea, being a reasonable sum of money for his costs and charges in and about his

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attendance as a witness, according to the tenor of the said writ of subpoena; and that although the said cause was, at the said sitting, afterwards, to wit, on the 8th day of *December*, A. D. 1832 aforesaid, called on to be tried before the said Chief Justice at *Westminster Hall* aforesaid, and although the said defendant was duly required to be and appear as a witness at *Westminster Hall* aforesaid, on the day and year last aforesaid, at the sitting of the Court, according to the tenor and effect of the said writ of subpoena, and his duty in that behalf, and although the said defendant could have given *material evidence for the said plaintiffs* on the trial of the said issue, and without whose evidence the said plaintiffs *could not safely proceed* to the trial of the said cause; yet, the said defendant, well knowing the premises, but not regarding, &c., and contriving, &c., did not nor would appear as a witness at *Westminster Hall* aforesaid, on the day and at the time he was so required to attend as aforesaid, according to the exigency of the said writ of subpoena, although he, the said defendant, was then and there solemnly called upon for that purpose, and had no lawful or reasonable excuse or impediment to the contrary, but then and there wholly refused, neglected, and declined so to do, to wit, at *Westminster Hall* aforesaid, and by reason thereof, and because the said plaintiffs could not *safely proceed* to the trial of the said cause without the testimony of the said defendant, they, the said plaintiffs, were afterwards, to wit, on the said 8th day of *December*, in the year aforesaid, forced and obliged to, and did withdraw the *Nisi Prius* record of the said issue, by means of which said several premises the said plaintiffs were forced and obliged to pay, &c., divers costs, charges, and expenses of their monies, amounting, &c., and were also greatly hindered and delayed in trying the said cause, and in the recovery of their damages in the plea aforesaid, &c., &c.—Plea, General issue.

At the trial, before *Gurney*, B., at the *Middlesex* Sit-
tings after last term, the plaintiff had a verdict, with leave
to the defendant to move on the several points hereinafter
mentioned. The facts of the case appear sufficiently from
the report of the discussion upon the motion for the rule
nisi.

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Channell now moved accordingly.—The plaintiff is en-
titled to have the judgment arrested on two grounds:
first, because the record stated that the plaintiff with-
drew his record, whereas, in *Bland v. Swafford* (a), it was
decided that the plaintiff, in order to recover against a wit-
ness for not appearing, must have the jury sworn, and be
nonsuited on account of the non-appearance of the witness.
Lord *Kenyon* said, in that case, that the Court had not
jurisdiction until such time as the jury were sworn. That
case was questioned in *Barrow v. Humphreys* (b); but it
was not there necessary to decide the point, as it was a
motion for an attachment, and the Court of *King's Bench*
thought that a contempt had been committed by the non-
appearance. *Bland v. Swafford* was untouched therefore
by that decision, and has never been over-ruled. *Secondly*,
the declaration is bad for not averring the existence of a good
cause of action in the original action. [*Bayley*, B.—In
an action for an escape, it is necessary to allege a good
cause of action in the original suit.] In the precedent in
Chitty (c), it is averred that the evidence would have en-
abled the plaintiff to have obtained a verdict; and in *Mas-
terman v. Judson* (d), there were words of similar import,
which the Court held, after verdict, to be equivalent to an
allegation of a good cause of action. In the present de-
claration there are no words which can be construed as
amounting to such an allegation.

(a) *Peake*, N. P. C. 60.

(b) 3 B. & A. 598.

(c) 3 Ch. Plead. 428.

(d) 8 Bing. 224; *S. C.* 6 M. &
P. 370, n. (a).

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On three points the defendant is entitled to a nonsuit, or new trial. *First*, there was no sufficient evidence of the service of the subpœna, as alleged in the declaration. The declaration alleged, that the plaintiff caused the writ of subpœna to be made known and *shewn* to the said defendant, and then and there caused a copy to be left with the said defendant of so much of the said writ of *subpœna* as related to the defendant. It was distinctly in evidence that the original writ of subpœna was not shewn to the defendant. The shewing of the writ is absolutely necessary for a good service (*a*). [*Bayley, B.*—It is necessary for the purpose of bringing the party into contempt, but not for the purpose of an action on the case for not appearing. If the shewing the original were not essential, you need not prove it. You may reject the allegation as to shewing the writ, if you have proved so much of the declaration as is necessary to the action. If, indeed, you connect an immaterial with a material allegation, so that they are inseparable, you must prove it as laid. There are cases (*b*) in which the words “by virtue of an affidavit,” &c., have been unnecessarily added to the material allegation of a writ issuing marked for bail, &c.; and it has been held that it was necessary to prove the affidavit.] Here, the allegation of shewing is connected with that of serving and making known. The shewing was the *modus operandi*. The writ was made known and served by being shewn to the defendant. In *Bristow v. Wright* (*c*), a variance in the allegation of the amount of rent was held material, though it was not necessary to state any amount. [*Bayley, B.*—There they failed in proving a part of an entire contract. Here, the averment is not that the plaintiff made known by shewing, but made known and shewed.] *Secondly*, the allegation of the defendant being a witness,

(*a*) 1 Stark. Ev. 2nd edit. 77.

(*b*) 1 B. & P. 280.

(*c*) Doug. 665.

without whose evidence the plaintiff could not go to trial, was not proved. He was not an indispensable witness. It appeared that there was another witness, on whose evidence the plaintiff might have proceeded, and the defendant was wanted merely to rebut the evidence of a witness who was expected to be called upon the part of the defendant. [*Bayley, B.*—Suppose a plaintiff can recover 5*l.* without a witness whom he has subpoenaed, and a much larger sum if the witness attends, may he not say he was a witness without whom he could not safely try his cause? or, suppose that there is a set-off, and the witness subpoenaed is in possession of a document which will invalidate the evidence of a witness for the defendant in support of the set-off, may not the plaintiff say, he is a material witness, without whom he cannot safely proceed to trial, because it happens that he can launch a case without him? The witness need not probably, for the purpose of this action, be indispensably necessary, if he be material.] *Lastly*, there was no injury to the plaintiff, for the plaintiff was not in readiness to try the cause if the witness had been in attendance. The defendant's attorney swore, it is true, that he had the draft of the brief, and that he could have got counsel, who were in attendance, to hold the brief; but if they had done so, it would have been mere matter of kindness, on which he had no right to speculate. The plaintiff, not having been in a condition to proceed with the cause, cannot, therefore, complain of the defendant's absence. The attorney could not have been heard himself, and the chance of getting the cause conducted by counsel then in attendance was too remote. [*Bayley, B.*—I have insisted on the attorney proceeding himself in such a case, and Lord *Mansfield* and Lord *Kenyon* used to do the same. But the evidence of the attorney is distinct, that he withdrew the record on the ground of the absence of the defendant solely.] He admitted that he neither sent for his own counsel, nor spoke to any other counsel on the subject.

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BAYLEY, B.—I think that there ought to be a rule for arresting the judgment on the two points which are on the record. The first is, that the plaintiff withdrew the record, and did not, in consequence of the absence of the witness, suffer himself to be nonsuited. By withdrawing the record, a part only of the costs which a nonsuit would have occasioned are incurred. The authority of Lord *Kenyon*, however, ought not slightly to be over-ruled; and he certainly decided in the case which has been cited, that the plaintiff could not recover where he withdrew the record, and did not proceed to be nonsuited. We, therefore, consider the point as so far doubtful, as to make it right to grant a rule on this point for arresting the judgment. Upon the point, also, of there being no allegation of a good cause of action in the original cause, we think that there should be a rule to shew cause why the judgment should not be arrested. Upon the points which go to a new trial or nonsuit, I think that there should be no rule. The first point made is, that the original subpoena was not shewn to the defendant. It is necessary to shew the original for the purpose of bringing the party into contempt; but it is not necessary to shew it for the purpose of bringing an action of this nature. There is a distinction even in the service of rules between the cases where you are to bring the party into contempt, and where the rule is not served with that object. In the latter case, the service is good without shewing the original, at all events, unless the party demand to see it. Now, in this case, the party has the original writ of subpoena; he serves the defendant with a copy, and the defendant does not require to see the original subpoena, and he receives the conduct money. Under these circumstances, I think that the allegation that the writ of subpoena was made known to the defendant was made out, and the allegation that it was shewn to the defendant may be rejected.

The next question is, whether the defendant is to be considered as having been a necessary witness in this case? I do not say that it is essential in such an action to make out that the witness is actually indispensable. Probably it would be sufficient to shew that he was material; but it is contended here, that he cannot have been a necessary or material witness on the occasion in question, because it is said that we are to look at the case as it stood when the cause was called on, and that the plaintiff, if he had proceeded, would have been almost sure of succeeding without the witness. Now, as to this point, the facts were these: the plaintiff had two persons, the present defendant and another, to speak to the occupation of the premises by the then defendant, for which he was seeking to recover. The present defendant, however, was not wanted merely to prove the occupation, but there being a defence of a set-off expected, the defendant was also wanted to rebut this set-off. The plaintiff's attorney swore, that he withdrew the record solely on account of the absence of the witness. It was argued also, that, inasmuch as the plaintiff's counsel were not present, the cause could not have been tried; and therefore, that damage did not arise from the absence of this defendant. It was, however, a question for the jury, whether the withdrawing the record was or was not occasioned solely by the absence of the defendant. This was the essential point for the consideration of the jury, and it appears to have been fairly and properly left to them. They were told, that they were not to find for the plaintiff, unless they were satisfied that the record was withdrawn on account of the absence of *Hunt*, and on account of his absence *only*. The plaintiff's attorney, a witness who must have known the fact, swore positively that the absence of counsel was not the foundation of his conduct in withdrawing the record; but that he withdrew it solely on account of the absence of *Hunt*. He said, that he had the draft of the brief with him, which he

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Esch. of Pleas, 1833. could easily have handed over to the counsel who were then in Court.

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Rule *nisi*, for arresting the judgment, granted: rule for nonsuit or new trial refused.

Comyn shewed cause.—*Masterman v. Judson* (a) is an answer to the objection that there is no distinct allegation of a good cause of action in the original suit. In that case, the declaration alleged that the defendant was a material witness in the original suit, and that his absence caused the plaintiff to be nonsuited; and it was held by the Court of *Common Pleas* to be sufficient, after verdict, although there was no averment that the plaintiff had a good cause of action in the original suit. As to the other objection, that the plaintiff was not nonsuited, but withdrew his record without the jury being sworn, *Bland v. Swafford* (b) is certainly an authority that an action will not lie, unless the cause be called on, the jury sworn, and the plaintiff be nonsuited. That authority, however, was questioned in *Barrow v. Humphreys* (c). Mr. Justice *Best* there said, that, whenever a case similar to *Bland v. Swafford* should again occur, it might be worthy of consideration whether that case could be supported. The whole Court of *King's Bench* decided in *Barrow v. Humphreys*, that an attachment for a contempt would lie against the witness, although the cause were not called on for trial, but the plaintiff withdrew his record. [Lord *Lyndhurst*.—They did not *decide* the point. The case appears to have been ultimately decided upon the merits disclosed in the affidavits.] Although it was not necessary to decide the point, all the Judges expressed a strong opinion that the party was guilty of contempt by not appearing in such case. In *Bland v. Swafford*, Lord

(a) 6 M. & P. 370, n. (a); 8 Bing. 224. (b) Peake, N. P. C. 60.
(c) 3 B. & A. 598.

Kenyon appears to have formed his opinion upon a view of the case which is now determined to be incorrect. He gave as a reason for his determination in that case, that the Court had no authority to call a witness on his *subpœna* until the cause was called on, and the jury sworn. Now, in *Hopper v. Smith* (a), it was decided that the plaintiff had a right to have a witness called upon his *subpœna* without having the jury sworn; and Lord *Tenterden* stated that the practice now was to allow that course to be taken. The Court has a jurisdiction to issue the writ; and, if the party neglects to appear, he not only disobeys the Court, so as to incur the punishment for a contempt, but he inflicts a wrong upon the party, for which wrong an action on the case is the proper remedy. It is not disputed that an action will lie against the witness for not appearing, if the party be nonsuited in consequence thereof; and it is most absurd to say, that the party, to enable himself to obtain redress, must involve not only himself, but the party offending, in needless and useless expense. The swearing the jury and being nonsuited are mere matters of form, and greatly increase the expenses. No reason can be given for its being requisite to go through this farce, and it is impossible to support the case of *Bland v. Swafford* upon principle.

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Coleridge, Serjt., and *Channell*, *contrà*.—It is not disputed that an action on the case may be maintained against a witness for not appearing in obedience to a *subpœna*, whereby a plaintiff is nonsuited. That was decided in *Amey v. Long* (b). In that case, however, there was a distinct averment of a good cause of action. It is stated, that the production of the warrant, which the witness was required to produce, would have enabled the plaintiff to have obtained a verdict. In the present case, there is no

(a) M. & M. 115.

(b) 9 East, 473.

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statement that the plaintiff could have obtained a verdict if the defendant had appeared. [Lord *Lyndhurst*, C. B.— Could the evidence be *material*, if the plaintiff had no cause of action? Must we not imply, after verdict, that there was a sufficient cause of action? The jury have found that the defendant could have given material evidence in that action. Is not that saying impliedly that the plaintiff had a good cause of action?] A man may be able to give material evidence for a plaintiff in a case where there is no good cause of action. Suppose an instrument were unstamped, the attesting witness would be a material witness, although there were no good cause of action. Many cases might be put to shew that an allegation of a witness being able to give material evidence, is not a sufficient allegation that there is a good cause of action. [Lord *Lyndhurst*, C. B.— What was there in the declaration in *Masterman v. Judson* which is not also in this count? The allegation there was, that, by reason thereof, the plaintiff was nonsuited: here it is, that, by reason thereof, the plaintiff was obliged to, and did withdraw his record.] As to the second point, *Bland v. Swafford* is expressly in point. The distinction between that case and *Barrow v. Humphreys* is obvious. By not appearing in Court when called, the witness disobeys the writ, and is guilty of a contempt of the authority of the Court which has issued the subpoena, and this contempt may be incurred whether the jury be sworn or not, and that was the effect of the decision in *Hopper v. Smith*. It is essential, however, for a civil action, that the party should have sustained an injury. If a plaintiff be nonsuited, it appears distinctly that he has sustained such injury; but, if he withdraws his record, there is nothing but the expression of his own opinion, that, in his judgment, there is danger. If the jury were sworn, the witness might appear in time before the nonsuit took place. [Lord *Lyndhurst*, C. B.— Does not the decision in *Hopper v. Smith* break in upon the

principle upon which *Bland v. Swafford* was decided? Lord *Kenyon* said that the Court had no jurisdiction. He must have meant no jurisdiction to have the witness called. If the law on that point is now settled in a different way, the principle upon which *Bland v. Swafford* was decided seems to fail. *Bayley, B.*—In *Bland v. Swafford*, the point was reserved, and the plaintiff ultimately failed on the merits, so that there was no opportunity of bringing the question before the Court. Lord *Lyndhurst, C. B.*—The doubt entertained by Lord *Kenyon* in *Bland v. Swafford* seems removed by the later case of *Hopper v. Smith*.] That decision only goes the length of saying, that a witness may be called on his *subpœna* without the jury being sworn; and that may be so, in order to ground proceedings by attachment against him for contempt. There may be very good reasons why an attachment should issue, though an action may not lie. The former is for a contempt to the authority of the Court; the latter, for the injury to the party, which must be clearly ascertained to have existed before any action can be maintained. If a plaintiff be bound to have the jury sworn in such case, there is a certain rule, and it is clearly ascertained whether he fails from the non-attendance of the witness. If he is not so bound, it remains uncertain whether he has or has not been injured by the absence of the witness. It may have been his opinion, or that of his attorney, that he could not safely proceed in consequence of the absence of the witness, and yet, in reality, no injury may have been sustained thereby. Thus, in the present instance, if the plaintiff had proceeded to try the cause, he would, in all probability, have succeeded, as there was another witness to the fact of the use and occupation.

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Lord *LYNDHURST, C. B.*—There are two objections made to the declaration in this case. The first is, that there is no averment that the plaintiff had a good cause

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of action in the original suit. I am of opinion, that a good cause of action is sufficiently averred, so as to be good after verdict. The declaration states that the evidence which the witness could have given was material evidence in the cause, and that the plaintiff could not safely proceed to trial without it. Now, in my opinion, no evidence could be material in the cause, unless the plaintiff had a good cause of action; and therefore, after verdict, I think that we must hold the declaration sufficient in this respect. The averments in this case are substantially the same with those in the case of *Masterman v. Judson*, and I think that the present case falls within the principle of that decision.

On the other point, the rule was obtained on the authority of *Bland v. Swafford*; in which case, Lord *Kenyon* is reported to have held that no action lies against a witness for non-attendance, unless the cause has been called on and the jury sworn. That authority seems to have been doubted in the subsequent case of *Barrow v. Humphreys*, and, as has been observed by my brother *Bayley*, Lord *Kenyon*, in *Bland v. Swafford*, reserved the point, and, from the course which the cause took, there was no opportunity of bringing it before the Court. It appears also, that, in that case, Lord *Kenyon* rested his decision on the ground that the Court had no jurisdiction until the jury were sworn. According to the modern practice and the case of *Hopper v. Smith*, however, it appears that the principle upon which Lord *Kenyon* proceeded in *Bland v. Swafford* was erroneous; and that the Court at *Nisi Prius* has jurisdiction, and that the party may, before the jury is sworn, have the witness called on his *subpœna*, with a view to withdraw his record if the witness do not appear. In *Barrow v. Humphreys*, where *Bland v. Swafford* was cited, Lord *Tenterden* expressed a doubt as to the correctness of the decision of *Bland v. Swafford*, and in looking

through the judgments of all the learned Judges who gave judgment in *Barrow v. Humphreys*, it appears that they all entertained doubts of the correctness of the ruling in *Bland v. Swafford*. Notwithstanding, therefore, that case, which is directly in point, I am of opinion that the plaintiff may maintain this action, and that the present rule for arresting the judgment should be discharged.

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BAYLEY, B.—The first objection in this case is, that it is not averred in this declaration, that the plaintiff had a good cause of action in the action brought by him in the *King's Bench*. I agree that it is essential that such fact should appear on the declaration; but, though not expressly averred, if it appear from the allegations that he must necessarily have had such cause of action against the defendant in the original suit, the declaration will be sufficient after verdict. Now, here the allegations are, that the witness could have given material evidence for the plaintiff on the trial of the issue, and that the plaintiff could not safely proceed to the trial without the evidence of the witness; and I think that these allegations must be held to imply that the plaintiff had a good cause of action.

The declaration proceeds to allege, that the witness, though solemnly called, did not appear; and that, by reason thereof, and because the plaintiff could not safely proceed to trial without the testimony of the defendant, he was forced and obliged to, and did withdraw the record of *Nisi Prius*. Now, that raises the second objection, because it is insisted, on the behalf of the defendant, that an action of this nature is not maintainable unless the cause has been called on, the jury sworn, and the plaintiff nonsuited on account of the absence of the witness. I cannot see the necessity of going through this form. If the Judge suffers the witness to be called upon his *subpœna*, without the jury being sworn, and the witness does not appear, I think that the plaintiff has a right to

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withdraw his record; and that he is at full liberty to place himself in a situation in which he will have to sustain the minor expenses incurred thereby, instead of the larger expenses attendant upon a nonsuit. By this course, the party offending is ultimately benefited. If, indeed, he could shew that he had sustained an injury by the plaintiff not having proceeded to have the jury sworn, perhaps that might vary the case; but, if he cannot shew such injury, how are we to see that he is in any way prejudiced, or how does it appear that it is material to his interest that the plaintiff should have suffered a nonsuit? The authority of *Bland v. Swafford* certainly shews the impression which the very eminent Judge who presided on that occasion entertained at *Nisi Prius*. I may, however, remark, that Lord *Kenyon* was not in the habit of saving a point, and going on with the trial of the cause, when his mind was perfectly satisfied. Now, in *Bland v. Swafford* he did save the point, and proceeded with the cause; and I am, therefore, inclined to think that he had not a firm conviction on his mind of the correctness of the impression which he then entertained. That case is considerably shaken by *Barrow v. Humphreys*, where the Court of *King's Bench* expressed a strong opinion that a witness was guilty of a contempt, for which an attachment would lie, by not appearing, although the record was withdrawn, and the jury were not sworn. I do not see any substantial distinction, in this respect, between an attachment and an action for compensation; and I am of opinion, that both the grounds for arresting the judgment in this cause fail, and that the rule ought to be discharged.

BOLLAND, B.—As to the first point, it appears to me, that the allegation that the defendant could have given material evidence in the cause, and that the plaintiff could not safely proceed to trial without his testimony, must after verdict be considered as a sufficient allegation of a good

cause of action in the original suit. The second objection is founded entirely on the authority of *Bland v. Swafford*. Lord *Kenyon* seems to have thought, in that case, that a Judge sitting at *Nisi Prius* had no jurisdiction unless the jury were sworn. The contrary, however, now appears to be the practice. If the question be considered as one of reason and expediency, it is clear that there can be no object in requiring the plaintiff to be nonsuited. If tried by the test of whether or no the Court had the power of issuing an attachment, it appears, from *Barrow v. Humphreys*, that the Court have such power. Lord *Mansfield* puts the proceedings by attachment and the action for damages on the same ground in *Pearson v. Iles* (a). I think that the Judge clearly had jurisdiction to allow the party to be called upon his *subpœna* without the jury being sworn. The defendant is not damnified by this course being taken; on the contrary, it is a benefit to him.

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GURNEY, B.—I am of the same opinion. With respect to the objection that the jury ought to have been sworn, I have known many instances where Judges at *Nisi Prius* have allowed the course to be adopted which was taken in *Smith v. Hopper*. In such a case, I am of opinion that the party may proceed either by attachment or action. It is conceded here that he might have proceeded by attachment, and I can see no reason why he has not also the remedy by action. The rule for arresting the judgment must be discharged.

Rule discharged.

(a) Dougl. 561.

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THOMPSON v. DICAS.

Since the passing of the Uniformity of Process Act, the writ of summons is to be considered as the commencement of the action; and the declaration must correspond with the form of action specified in the writ; and if the declaration is in a different form of action, it is irregular, and the Court will set it aside, leaving the plaintiff to declare on the writ, if he can do so according to his cause of action.

MANSEL obtained a rule for setting aside the declaration, with costs, for irregularity. The objection was, that the writ was in trespass on the case, and the declaration was in trespass.

Chilton shewed cause.—The irregularity, if any, is not in the declaration but in the writ. It does not appear, even, that the defendant was served with no other writ; he merely shews that he was served with a writ of summons marked (A). In such case the defendant is bound, at least, to shew that there was no other writ. The objection relied on is, that the writ is in trespass on the case, and the declaration in trespass. Before the Uniformity of Process Act, it is clear that this was no objection on which the declaration could be set aside. [*Bayley, B.*—It was then merely process to bring the party into Court.] What then is the effect of the Uniformity of Process Act? It directs that the writ shall disclose the true cause of action. If it do not so disclose the true cause of action the writ is irregular. Here it must be taken that the declaration discloses the true cause of action, consequently the writ which discloses a different cause of action is irregular, and the defendant should have moved to set aside the writ, and is mistaken in moving to set aside the declaration. In *King v. Sheffington* (a), it was decided, that the writ must be in the exact form prescribed by the act; and that if the act is not strictly adhered to, the writ is irregular. In *Hasker v. Jarmaine* (b), this Court said, you might have moved to set aside the writ for irregularity; but the application being to set aside the service, they discharged the rule. [*Vaughan, B.*—In that case the writ was bad on

(a) *Ante*, p. 363.

(b) *Ante*, p. 408.

the face of it. It was not dated, on the face of it, according to the provisions of the act of Parliament; here the writ is perfectly good. *Bayley, B.*—The writ here is a good writ, but it does not justify the declaration]. The defendant ought to be left to his demurrer, if he can have any advantage from such a variance. [*Bayley, B.*—It is not ground of demurrer; it is matter of irregularity. The writ used to be mere process to bring the party into Court. Since the Uniformity of Process Act, however, it is considered to be the commencement of the suit, with which the subsequent proceedings are to correspond. *Gurney, B.*—The writ is a perfectly good writ. The superstruc-tion founded upon it is bad].

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BAYLEY, B.—Before the passing of the 2 *Will. 4*, c. 39, the writ was merely process, and you were at liberty to declare in any form of action which was suitable to your case, without reference to the writ. Since that act of Parliament, the writ of summons is the commencement of the suit, and must specify the true form of action; and, in your declaration, you must pursue the form of action specified in the writ of summons. Now here, the writ of summons is in trespass on the case, and, when you come to declare, will warrant a declaration in trespass on the case, and trespass on the case *only*. When, therefore, you declare in trespass, what is wrong? Why, the declaration, which is not warranted by the writ of summons. The declaration, therefore, in this case must be set aside; and, if the plaintiff's cause of action will enable him to declare on this writ, he is still at liberty to do so.

The rest of the Court concurred and the rule was made—

Absolute.

It being suggested to the Court that the affidavits in

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support of the rule contained much irrelevant and libellous matter, the question as to costs was ordered to stand over; and the affidavits were referred to the Master, who subsequently reported, that the parts objected to were impertinent, and ultimately the rule was made absolute without costs.

FAGG v. BORSLEY.

Where a plaintiff amends his declaration with liberty to the defendant to plead *de novo*, if the defendant do not plead *de novo*, the former plea will stand, if it be applicable to the amended declaration.

IN an action of covenant the defendant pleaded several special pleas. The plaintiff had leave to amend, with liberty for the defendant to plead *de novo*, or to demur. The plaintiff amended by merely adding new counts on the same cause of action, but did not alter the old ones. The old pleas remaining upon the record, the plaintiff, without giving a rule to plead, or demanding a plea, signed judgment as for want of a plea.

Steer obtained a rule to set aside this judgment for irregularity.

W. H. Watson shewed cause.—*Huckvale v. Kendal* (a) is exactly in point; it was decided in that case that a demand of a plea was not necessary to enable a plaintiff to sign judgment after the delivery of an amended declaration.

Steer, contra.—In that case a rule to plead was given. Here we rely on our original pleas, which the plaintiff had no right to treat as a nullity. We were at liberty, under the order in this case, to plead *de novo*, or not, as we thought fit.

BAYLEY, B.—Were any of the pleas an answer to the

(a) 3 B. & A. 137.

new count? If there was no plea applicable to the new count, the plaintiff might take judgment for that, or else there would be a discontinuance. I have no difficulty in stating, that, if there be a plea before amending the declaration, and the form of the order to amend be that the defendant should be at liberty to plead *de novo*, if he do not plead *de novo* the former plea will stand, if it be applicable to the amended declaration.

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Rule absolute.—Costs to be costs in the cause.

LEWIS v. PINE.

CARRINGTON obtained a rule for setting aside the proceedings in a *scire facias* against bail for irregularity. The objection insisted on in the argument was, that the bail were not summoned until after eight o'clock on the evening before the return-day.

In *scire facias*, the bail were summoned after eight o'clock on the evening before the return-day of the *scire facias*:—Held regular.

Hutchinson shewed cause.—The bail may be summoned at any time before the rising of the Court on the return-day of the *sci. fa.* *Tidd's Practice* (a). *Clarke v. Bradshaw* (b). The rule is, that they cannot be summoned after the rising of the Court on the return-day, but if they are summoned at any time before, it is sufficient.

Carrington, contra.—The only object of summoning the bail is, that they may have an opportunity of rendering the principal. It would be impossible to do this if the bail may be summoned so late as that the bail must be fixed before they can render. The late rule (c) was in-

(a) Page 1177, 8th edit. (b) 1 East, 86. (c) H. T. 2 W. 4, 81.

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tended to alter the old practice, by which proceedings might be taken behind the backs of the bail, and they are now to have fair notice. In *Webb v. Harvey (a)*, the Court of *King's Bench* set aside the proceedings because the bail were only summoned an hour before the rising of the Court.

Lord LYNDHURST, C. B., referred to the judgment of Lord *Kenyon*, in *Clarke v. Bradshaw*, where the report in *Webb v. Harvey* is stated to be erroneous, and

Per Curiam.—*Clarke v. Bradshaw*, and the passage in *Tidd's Practice*, shew that the proceedings have been regular in this case.

Rule discharged.

GOUBOT v. DE CROUY.

The Court will not set aside a return by a sheriff, upon motion on affidavits, though they shew a strong case of fraud and collusion. If the sheriff takes on himself to state facts which constitute a good return in point of law, the only remedy is by action for a false return.

IN this case the sheriff returned to a *capias* against the defendant, that he was not to be found in his bailiwick from the time of the delivery of the writ until the 18th *February*; and that upon that day, and until the return, the defendant was and yet is in the service of the Sicilian Minister at the British Court as a domestic servant.

Busby moved to set aside the return on strong affidavits, shewing fraud and collusion between the sheriff's officer and the defendant; that the defendant was in trade; that he had said he was endeavouring to get attached to the embassy; and that he had been taken and collusively discharged by the officer.

BAYLEY, B.—We cannot interfere upon motion. Your

(a) 2 T. R. 757.

only course is, by bringing an action against the sheriff for a false return. We cannot investigate the truth of the return on affidavits.

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v.
DE CROUY.

Rule refused.

HORTON v. The Inhabitants of STAMFORD.

THIS was an action for a felonious injury to property by rioters, under the 7 & 8 *Geo.* 4, c. 31. The writ had been sued out against the defendants by the name of "the Inhabitants of the *Hundred of Stamford*." *Stamford* is not a hundred, but is a borough lying partly in the county of *Lincoln*, and partly in the county of *Northampton*. The time for bringing a new action had expired.

Where a plaintiff, by mistake, had proceeded against the inhabitants of the *hundred* instead of the *borough* of *S.*, in an action for damage by rioters under the 7 & 8 *Geo.* 4, c. 31, the Court amended the writ and subsequent proceedings, by striking out the word "hundred", and substituting the word "borough," the time for bringing a fresh action having expired.

Kelly obtained a rule to amend the writ and subsequent proceedings by substituting the word "borough" instead of "hundred."

Hildyard shewed cause.—The Court has no power or jurisdiction to make such an alteration. It is clear that they could not have done so at common law. Until the Uniformity of Process Act, the proceedings in such cases must have been by original writ, and the Courts where such writs were returnable could not have amended them. [*Bayley, B.*—In such case, the Court would have amended the *capias*; and the *Master of the Rolls* would, on application to him, have granted an original, corresponding with, and which would have supported, such amended *capias*. In *Carr v. Shaw (a)*, the Court amended the special *capias* in the Christian name of one of the parties, though there was nothing to amend by. That was an amendment at common law. In the present case,

(a) 7 T. R. 299.

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there is no such hundred as the one mentioned in the writ.] The present case bears no analogy to that of a mistake in the Christian name of a man. There the misnomer can be pleaded in abatement; here, the misdescription is a matter of substance. There is no hundred of *Stamford* in *rerum natura*; and, as the provisions of the 7 & 8 *Geo.* 4, c. 31, are inapplicable to the case of a borough like that of *Stamford*, which lies in two counties, the plaintiff must have been nonsuited. [*Bayley, B.*—It is to prevent a nonsuit on a ground which is not connected with the justice of the case that this amendment is prayed for. The plaintiff wishes to try the question, whether the inhabitants of a place so situated are not liable?]

Kelly, in support of the rule, referred to *Baker v. Neave (a)*, where an action had been brought by two assignees of a bankrupt, and the proceedings were amended by adding a third. He referred also to similar amendments in cases of actions against joint stock companies. He was then stopped by the Court.

BAYLEY, B.—It seems to me that the amendment ought to be made as prayed. This is an action brought in substance against the inhabitants of *Stamford*. The plaintiff says that he has been injured, and that they are liable to him for the damage. The act of Parliament, 7 & 8 *Geo.* 4, c. 31, gives him, as he supposes, a remedy. He has attempted to sue the proper persons, so as to raise the question, whether he has a remedy under the act of Parliament? He has, however, mistaken the name of the district or place. It appears to me that we should be doing injustice, if we were to allow him to be concluded by such a mistake. If the record were to go uncorrected to trial,

(a) *Ante*, p. 112.

justice would be defeated, merely because the advisers of the plaintiff have been guilty of a slip. There are instances, even in cases of penal actions, where the Courts have allowed amendments, and have given as their reason for such amendments, that the parties would be too late if the amendments were not allowed. Plaintiffs' names have been added and changed repeatedly; and since the late Bankrupt Act, we have had several recent instances where the names of the official assignees of bankrupts have been added to prevent a failure of justice. I think that the rule should be made absolute upon payment of costs, and the defendants having a fortnight's time to plead.

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VAUGHAN, B.—The 7 & 8 *Geo.* 4, c. 31, though penal in some respects, is highly remedial in others. I am of opinion, that the amendment should be allowed to let in the justice of the case.

The rest of the Court concurred, and the rule was made—

Absolute on payment of costs, the defendants having a fortnight's time to plead.

PRITCHET v. BOVEY.

TRESPASS and false imprisonment for an illegal arrest by a sheriff's officer upon mesne process against the present plaintiff. The declaration alleged, by way of special

A., having been illegally arrested on mesne process, applied to the Court to be discharged. The rule was

referred to a Judge at chambers, who ordered him to be discharged, and would have given him the costs of the rule if he would have undertaken to bring no action; but, as he refused to give such undertaking, nothing was ordered as to costs.

In an action of trespass and false imprisonment brought by *A.* for the arrest, it was held, *first*, that he was entitled to recover those costs as special damage if properly laid in his declaration; and, *secondly*, that, as the declaration only alleged that he had been forced and obliged to pay and had paid *C.*, he could not recover the whole of the bill of costs of his attorney which he had not paid, though he was liable to pay them; but that he might recover so much of the bill of costs as consisted of money actually paid by the attorney, as that might be considered as money paid by him through his agent.

Semble, that under an averment that he had been forced and obliged to, and had become liable, &c., he might have recovered damages for such liability.

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damage, that the plaintiff had been forced, and obliged to pay, and had paid, large sums of money in applying for and obtaining a discharge from the imprisonment. At the trial at the last Spring Assizes for the county of *Gloucester*, it appeared that the plaintiff, having been illegally arrested, had applied to the Court for his discharge. The rule was enlarged to be heard before a Judge at chambers; and the Judge, upon the hearing before him, ordered the plaintiff to be discharged from custody. The rule of Court called on the party, at whose suit he had been arrested, to shew cause why she should not pay the now plaintiff the costs of, and occasioned by the arrest, and his application to be discharged. The question of costs was discussed before the Judge at chambers; and he proposed to make an order for them, if the plaintiff would undertake not to bring any action for the arrest. This was not acceded to, and the order for the plaintiff's discharge was made without any mention of the costs. It was contended at the trial, that these costs should be added to the damages for the trespass. Two questions were reserved—*first*, whether such costs were recoverable at all? and, *secondly*, whether, without proof of the money having been paid by the plaintiff to his attorney, they could be recovered under the averment in the declaration, that "the plaintiff had been forced and obliged to pay, lay out, and expend, and had necessarily paid, laid out, and expended divers large sums of money in and about &c., and in and about applying for a legal discharge and release from the said imprisonment?" The plaintiff had a verdict, with 1*s.* damages on the first count for the trespass, and 25*l.* damages on the second count for the false imprisonment, with leave to move to add to the verdict 102*l.* 1*s.*, the amount of the costs incurred by the plaintiff on the arrest, and his application to be discharged.

Talfourd, Serjt., having obtained a rule accordingly, cause was now shewn by

Ludlow, Serjt., and R. V. Richards.

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Talfourd, Serjt., and Curwood, were heard in support of the rule.

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BAYLEY, B.—The facts of this case are, that a bailiff got into the house of the plaintiff wrongfully, as the house was wholly closed, and arrested him. This action is brought for that arrest. The plaintiff applied to the Court for his discharge out of custody, and that the now defendant should pay the costs of that application. This rule was referred to Mr. J. Gaselee at chambers, who made an order that the plaintiff should be discharged because the arrest was illegal; and stated, that, if the plaintiff would undertake not to bring an action, he would grant him the costs of the rule. The plaintiff refused to give the undertaking, and therefore the Judge made no order for the costs. Upon these facts two questions arise. *First*, is the defendant liable to pay the costs? *Secondly*, is the plaintiff entitled on this declaration to add them to the damages recovered in this action? The case of *Loton v. Devereux* (a) is relied on as an authority, that, though the plaintiff necessarily incurred costs, he is precluded from recovering them here. But that case is distinguishable from the present: that was a motion to set aside a judgment and execution for irregularity, and the Court made the rule absolute, but without costs. That was an express adjudication that it should be without costs. In this case the learned Judge came to no such conclusion; he does not say that the plaintiff shall be released without costs, but makes no adjudication as to costs, and therefore the jury had a right at the trial to take these costs into their consideration.

As to the second point, though upon a declaration properly framed, the plaintiff would have been entitled to recover these costs, yet there is this objection in the present

(a) B. & Ad. 343.

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case;—this declaration does not allege that the plaintiff became liable to pay these costs, but that he was forced to pay a large sum of money. The evidence is, that an attorney was employed; but is he paid?—No. The plaintiff, then, cannot say that he was forced to pay, for it is only a debt which he may be hereafter forced to pay, but liable to contingencies, as if he be discharged by the bankrupt law; therefore, it is unreasonable that the plaintiff should recover what he may perhaps never pay. The bill of costs in question, of 102*l.*, included money advanced for the plaintiff by the attorney, and charges for work, and labour, and fees. A person may say that he has been forced to pay that which a man, who is his agent, has been forced to pay for him; therefore, in respect of the money advanced for him, he is in the same situation as if he borrowed it to pay over. The agent has advanced it for his use; and therefore, the part of the 102*l.*, which was money paid by the attorney to obtain the discharge, is money the plaintiff has been forced to pay, and he is entitled to recover so much. The bill must be sent to the Master to ascertain how much money has been so paid, that it may be added to the damages; the rest must not be added.

VAUGHAN, B.—The Judge at chambers had jurisdiction not only over the costs of the rule, but of the costs in the cause, and he has made no adjudication on them. As to the allegation that the plaintiff has been forced to pay, it is a material allegation, and proof of actual payment is necessary to support such an allegation.

BOLLAND, B., concurred.

Rule absolute for adding to the damages recovered so much of the bill of costs as was paid out of pocket by the attorney, and discharged as to the rest.

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BROOKS v. BLANSHARD.

CASE for a libel.—The first count stated, that the plaintiff, long before and at the time of the composing and publishing of the defamatory libel by the defendant thereafter mentioned, to wit, at &c., used, exercised, and carried on, for profit, the profession and business of a civil engineer, and as such had been appointed to superintend a certain railway, called the *Clarence Railway*, for and on the behalf of the company of proprietors of the said railway, and as such had superintended the said railway with great skill, diligence, and integrity, during the whole time that the plaintiff had such superintendence; and before and at the time of the composing and publishing of the said false, scandalous, malicious, and defamatory libel thereafter mentioned, there had been and still were certain commissioners, called the Commissioners for the improvement of the river *Wear* and the port and haven of *Sunderland*, &c.; and that the said commissioners, before &c., the composing and publishing of the said false &c., libel, by public advertisements and otherwise, called for and required a

A. was engaged to superintend the works of a railway company, and subsequently, at a general meeting of the proprietors, the engagement was not continued, but a former inspector was reinstated. A vacancy subsequently occurred in the situation of engineer to the commissioners for the improvement of the river *Wear*, and *A.* became a candidate. *B.* wrote to *C.*, introducing *D.* as a candidate, and *C.*, having written to *B.*, informing him that another person had succeeded in obtaining the appointment,

B. wrote an answer to *C.*, reflecting on the conduct of *A.* whilst in the situation of engineer to the railway company. There was a subsequent election, at which *A.* was unsuccessful in consequence of this letter having been shewn. It appeared that *B.* and *C.* were both shareholders in the railway company, and that *B.* managed *C.*'s affairs in the railway. *B.* had not been applied to for his opinion, and the letter, containing the libel, was written after the termination of one election, and before the other was in contemplation:—*Held*, in an action by *A.* against *B.* for the libel, that the letter was not a privileged communication.

In an action for libel, the libel as set out on the record imputed to the plaintiff "mismanagement, or ignorance." The evidence was, that the expression in the libel (which had been destroyed) was "ignorance, or inattention:—*Held*, a fatal variance.

Where no matter in print or writing is produced in evidence, a Judge at *Nisi Prius* has no power, under 9 Geo. 4, c. 15 (a), to amend the record from the oral testimony of witnesses called to speak to the contents of a written document which has been destroyed, and which contents, on their evidence, appear to be materially different from the statement of the document upon the record.

Quære, if a copy had been produced in such case, as secondary evidence, whether the Judge could have amended from such copy?

(a) See now 3 & 4 Will. 4, c. 42, s. 23.

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person, for great gain and profit, to act as civil engineer to the said commissioners in their said improvement of the river *Wear*, &c.; that the plaintiff, before and at the time of the composing and publishing the said false &c. libel thereafter mentioned, was, and still is, a fit, proper, and competent person to perform the duties of civil engineer to the said commissioners for the purposes aforesaid; that before and at the time of the composing and publishing the false &c. libel thereafter mentioned, the plaintiff applied to the said commissioners to be elected and appointed to the said office of civil engineer, and thereupon the plaintiff received several promises from several of the said commissioners, and particularly from one *Walter Featherstonehaugh*, one of the said commissioners, of support and assistance for and towards the election and appointment of the plaintiff to the said office of civil engineer; yet the defendant, well knowing the premises, but contriving, &c. to injure the plaintiff in his credit and reputation, and also in his said profession and business of civil engineer as aforesaid, and to cause it to be suspected and believed by the said commissioners that the plaintiff had conducted himself dishonestly, injudiciously, ignorantly, unskilfully, and improperly, as a civil engineer, in his (the plaintiff's) superintendence as such of the *Clarence Railway* aforesaid, and to cause it to be suspected and believed by the said commissioners that the plaintiff was incompetent and unfit to perform the duties of civil engineer to the said commissioners for the improvement of the said river *Wear* and port and haven of *Sunderland* aforesaid, and that the plaintiff was not a proper person to be elected and appointed such civil engineer as aforesaid, and to cause and induce the said commissioners to refuse to elect and appoint the plaintiff such civil engineer as aforesaid, and to vex, harass, oppress, impoverish, and wholly ruin the plaintiff, heretofore, to wit, on &c., at &c., wrongfully, maliciously, and injuriously composed, wrote, and published, and caused

to be composed, written, and published, a certain false, scandalous, malicious, and defamatory libel, of and concerning the plaintiff, in the way of and in respect to his said profession and business of civil engineer, and in respect to his said superintendence as civil engineer of the said *Clarence Railway*, in the form of and as a letter addressed to Mr. *Philip Laing*, which said Mr. *Philip Laing* then was and is one of the said commissioners, in which said letter was and is contained, amongst other things, the false, scandalous, defamatory, and libellous matter following; that is to say, Mr. *Brooks*, (meaning the plaintiff), whilst he had the superintendence of the *Clarence Railway*, (meaning the superintendence of the said railway called the *Clarence Railway*, as civil engineer as aforesaid), has, by his *mismanagement or ignorance*, cost that company (meaning the said company of proprietors of the said *Clarence Railway*) a considerable sum of money.

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The third count stated the libel thus: "Mr. *Brooks's* blunders have cost the *Clarence Railway* several thousand pounds," (meaning that the *ignorance and mismanagement* of the plaintiff had cost the said company of proprietors several thousand pounds).

The fifth count was, "Mr. *Brooks*, by his *mismanagement or ignorance*, cost the *Clarence Railway* several thousand pounds." The breach alleged, as special damage, that one *Walter Featherstonehaugh* did not support and assist the plaintiff in his endeavours to become elected and appointed civil engineer to the said commissioners; but opposed, and used his best endeavours to oppose, his election; and that the commissioners refused to elect him. The defendant pleaded the general issue. The case was tried before *Gurney, B.*, at the last Spring Assizes for the county of *Durham*. The letter containing the libel had been destroyed by Mr. *Laing*, who was called to give parol evidence of its contents. He said the letter from the defendant stated, "That *Brooks* had got employed by

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the *Clarence Railway*, and from *ignorance or inattention* had cost the company some thousands, or a large sum of money. He believed he had been brought up a drawing master, but did not seem to know much of engineering." Mr. *Featherstonehaugh*, another witness, proved that the words of the libel were, "He had been employed by the *Clarence Railway Company*; that from *inability and want of skill* he had done that on the railway, at the cost of several thousand pounds, which it took more afterwards to undo." It appeared, that the plaintiff had been engaged to superintend the works of the *Clarence Railway Company*. At a general meeting of the proprietors, however, the engagement of the plaintiff was not continued, and the former inspector was reinstated. Subsequently a vacancy occurred in the situation of engineer to the *Wear commissioners*, and the plaintiff became a candidate. On the 11th *February*, the defendant wrote a letter to Mr. *Laing*, introducing one *Bush* as a candidate, and, upon the 15th *March*, the defendant received a letter from *Laing*, that a Mr. *Leslie* was appointed. On the 16th *March*, the defendant wrote an answer to Mr. *Laing*, containing the libel. *Leslie* subsequently resigned, and there were then fresh advertisements for an engineer. On the 24th *April*, there was another election, at which the plaintiff was rejected, *Laing* having shewn the defendant's letter. It appeared, also, that the defendant and *Laing* were both shareholders in the *Clarence Railway*, and that the defendant, who was a ship-owner, resided in *London*, and managed *Laing's* affairs in the railway. The letter in question was on the subject of the mismanagement of the railway; and the defendant, at the time he wrote the letter, was ignorant that *Laing* was a *Wear* commissioner. It was objected, for the defendant, that this was a privileged communication, on the following grounds:—*First*, that the defendant and *Laing* were shareholders in the *Clarence Railway*, and that the letter was written *bond*

file on the subject of the management of the railway; and, *secondly*, that it was written respecting the character of a former servant; and that in either of these cases express malice must be proved, which had not been done. It was further objected, that the libel as proved varied materially from the statement of it in the declaration. The learned Judge allowed the cause to proceed, giving the defendant leave to move to enter a nonsuit; and reserving for the opinion of the Court the question, whether the variance, if any, could be amended under the 9 Geo. 4; and, in case the Court should be of opinion that the Judge had the power at *Nisi Prius* of directing such amendment, it was to be considered as made. The jury found a verdict for the plaintiff, with 1*s.* damages; at the same time expressing their opinion, that the defendant had acted without any malicious motive.

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Alexander, in *Easter* Term last, moved accordingly.—*First*, this was a privileged communication, and, without proof of express malice, the defendant was not liable to the action. But, so far from any malice being proved, the jury have expressly negatived its existence. The defendant and *Laing* were both shareholders in the *Clarence Railway*; the defendant managed *Laing's* interests in the concern, and the letter in question was upon the subject. It was, therefore, confidential. [Lord *Lyndhurst*.—The defendant was not applied to for any opinion, and the election was over. A communication is not privileged merely because it is confidential. *Bayley, B.*—The letter was written after one election was over and before the other was in contemplation]. In *Macdougall v. Claridge (a)*, it was held, that a letter written confidentially to persons who employed *A.* as their solicitor,

(a) 1 Camp. 267.

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containing charges injurious to his professional character in the management of certain concerns which they had entrusted to him, and in which the writer of the letter was likewise interested, could not be considered a libel. So, in *Cleaver v. Sarraude*, there cited by Lord *Ellenborough*, it appeared that the letter had been written confidentially to the Bishop of *Durham*, who employed the plaintiff as steward of his estates, to inform him of certain supposed mal-practices in the plaintiff. The Judge at *Nisi Prius* held that the action was not maintainable, the defendant having acted *bonâ fide*, and thereupon directed a nonsuit; nor was that ruling afterwards questioned. In *Dunman v. Bigg* (a) a similar doctrine seems to have been recognized. There the plaintiff wished to open an account with the defendant who was a brewer, and one *Leigh* became his surety for future supplies of beer, the defendant promising to inform *Leigh* of any default made by the plaintiff in his payments. After considerable dealings, the defendant went to *Leigh* and spoke in very opprobrious terms of the plaintiff, saying that he wished to cheat him; that he had sent beer back as unmerchantable which he himself had adulterated; that he was a rogue and a rascal. At this time there was money due from the plaintiff to the defendant in respect of his supplies on *Leigh's* guarantie. Lord *Ellenborough* inclined to think that the communication was privileged. His Lordship adds, "Had the defendant gone to any other man and uttered these words of the plaintiff, they certainly would have been actionable. But *Leigh*, to whom they were addressed, was guarantie for the plaintiff; and the defendant had promised to acquaint him when the arrears were due. He, therefore, had a right to state to *Leigh* what he really thought of the plaintiff's conduct in their mutual dealings;

(a) 1 Camp. 269, n.

and even if the representations which he made were intemperate and unfounded, still, if he really believed them at the time to be true, he cannot be said to have acted maliciously, and with an intent to defame the plaintiff."

These three cases shew that a participation of interest in the subject-matter of the communication will protect what otherwise might be clearly libellous; and the second case cited also negatives the supposed importance of the circumstance that the defendant volunteered his opinion without its being previously requested. But there is another ground on which this first objection may be supported. The letter regarded the character of a former servant, and was, therefore, privileged. *Edmonson v. Stevenson* (a), *Rogers v. Clifton* (b), *Weatherstone v. Hawkins* (c), *Bromage v. Prosser* (d), *Child v. Affleck* (e), *Ward v. Smith* (f), and many other authorities, establish this proposition—that the gist of an action for defamation, in giving the character of a servant, must be malice; and that such malice is not implied from the occasion of making the communication, but must be directly proved. But here the jury have negatived any malice. It may also be remarked, that, in *Rogers v. Clifton*, *Rooke, J.*, was of opinion, that it was immaterial whether the master were asked for the character of the servant or not, provided he spoke honestly; and the same doctrine was also laid down by *Bayley, J.*, in *Pattison v. Jones* (g). [*Bayley, B.*—There it was left to the jury to say whether the defendant had acted *bond fide* in the discharge of a duty, or maliciously; and they found it was done maliciously, which the Court thought entitled the plaintiff to a verdict. Lord *Lyndhurst, C. B.*—The action was brought on a second letter, in consequence of a general communication requesting infor-

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(a) Bull. Ni. Pri. 8.
(b) 3 B. & P. 587.
(c) 1 T. R. 110.
(d) 4 B. & C. 247.

(e) 9 B. & C. 403.
(f) 4 C. & P. 305.
(g) 8 B. & C. 584.

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mation respecting the servant's character.] In *Child v. Affleck* (a), the defendant added disparaging matters, which took place *after the plaintiff had left her service*, and also volunteered similar statements to the persons by whom the plaintiff had been recommended to her, yet, in the absence of any proof of their falsehood, the Court held them privileged.

As to the second objection, it is clear that there is a material variance, if the words alleged and those proved convey different ideas. This rule is distinctly laid down, and the authorities collected, in 2 *Phillips on Evidence*, 239. The *first*, *third*, and *fifth* counts of the declaration, which are the only counts that can be suggested to have been proved, aver that the defendant charged the plaintiff with "mismanagement," or "ignorance." The evidence establishes a charge of "ignorance," or "inattention." Now, it is impossible to deny the very different meanings of "mismanagement" and "inattention." They differ as much as "omission" and "commission."

Lord LYNTHURST, C. B.—There is nothing to lead us to the conclusion that this was a privileged communication; but, upon the ground of variance, we think that there should be a rule *nisi*.

Cresswell shewed cause.—The first question is, whether there was a variance? the second, whether, if there were, the Judge had not power to amend the record under the provisions of the 9 *Geo. 4*, c. 15?

First, there was no variance. The allegation was, by his mismanagement or ignorance; the evidence was, by his ignorance or inattention. Now mismanagement, as used here, is equivalent to inattention. Mismanagement may proceed from either of two causes—ignorance or carelessness. Here it cannot mean ignorance; that is excluded

(a) B. & C. 403.

by the latter part of the sentence. It can then only mean carelessness, that is, inattention. In a popular sense it is clear that there can be no such thing as intentional mismanagement, which would be called malicious. Mismanagement is clearly not a misfeasance, but a nonfeasance. [*Bayley, B.*—I do not see that mismanagement may not include malice and misfeasance.] In a popular sense it means either that the party neglected or did not know how to do it better; that is, that he was ignorant or inattentive. Here, ignorance cannot be meant by the word “mismanagement,” because ignorance is specifically tioned in the same sentence, and therefore mismanagement, as used here, must mean inattention. The case of the *Queen v. Drake (a)* shews, that it is not necessary to state the exact words, if the expressions used are synonymous; and it ought to have been left to the jury to say, whether, taking the whole letter together, the word was not used in the sense which would have agreed with the declaration; and the case ought, at all events, to go down again, that a jury may find in what sense the word was used. [*Bayley, B.*—That they may inform the Court on the construction of a libel and a question of variance?]

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Secondly, the learned Judge had authority to amend at *Nisi Prius*. The difficulty suggested at the trial was, that the letter containing the libel was not produced at the trial, but secondary evidence only given of its contents. Now the words of the statute are, “Where any variance shall appear between any matter in writing or in print produced in evidence, and the writing or setting forth thereof upon the record whereon the trial is pending,” &c.; and the doubt was, whether the learned Judge had authority to amend where no writing or print was produced? It is submitted that he had such authority, upon the liberal

(a) *Salkeld*, 660.

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construction which a statute of this kind ought to receive, and upon the construction which the Courts have put upon it in other cases. It has been determined upon this statute, that the Judge may amend from a copy of the matter in print or writing, set forth upon the record; and it would be singular if that were not so, as the power of amendment is much more likely to be necessary in a case of that kind, where the proceedings are framed from a copy, than where the original can be produced by the party. In *Briant v. Eicke* (a), a judgment of the Court of *King's Bench* was set forth on the record, and, in proof of it, was offered an *examined copy* of a judgment which appeared to have been given by the Court of *Common Pleas*. Lord *Tenterden*, after argument, amended the record. In that case, the strict construction of the words of the statute, on which the defendant in this case relies, was departed from; for the copy was not "set forth or recited" on the record, but the original judgment was set forth or recited. The only reasonable construction is, that where, on the record, you have to set out any written document, and your evidence varies from the record, the Judge is to have the power of ordering the amendment. The literal construction, that the Judge can only amend in the cases where there is a variance between the matter in writing, which is recited or set forth on the record, would exclude the power of amendment in all the cases where copies are offered in evidence, as in the cases of judgments, &c. In the case of a copy offered in evidence, the copy is not the thing set forth, but the evidence only of the thing set forth. Then how does the present case differ? What difference can there be between the case where a copy is the evidence of the thing set forth upon the record, and where other secondary evidence is given of the thing set forth on the record?

(a) M. & M. 359.

If, instead of the word *produced*, the word *proved* be substituted, the construction of the statute would be clear; and the Legislature, by the words "produced in evidence," must have meant "proved in evidence;" for, producing without proving would amount to nothing. In the present case, as well as in the case of proof by a copy, the words, "produce in evidence the matter in writing set forth," &c., were not satisfied. But in the present case we only go one step farther than *Briant v. Eicke*; here we substitute secondary evidence, by parol, for secondary evidence by a copy.

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Alexander, and W. H. Watson, contra.—It is clear that the word "inattention" is not synonymous with "mismanagement." "Mismanagement" is defined in *Johnson's Dictionary* as "ill management, ill conduct;" and "inattention" as "disregard, negligence, and neglect." The difference is, that the one is an offence of commission, the other of omission; the one of misfeasance, the other of nonfeasance. In the case of a counsel absenting himself from the trial of a prisoner whom he was retained to defend, you would say he had been guilty of inattention; if by asking incautious questions he causes his client's conviction, you would say he had mismanaged the case. So, a physician who absents himself from his patient might be said to be guilty of inattention; if by his want of skill and improper treatment he kills the patient, he might be said to have done so from mismanagement. Mismanagement may proceed from overzeal, want of judgment, and many other causes than inattention.

Then the record was not amendable under the 9 *Geo. 4*, on two grounds: *first*, because the variance was not in a matter "not material to the merits of the case;" and, *secondly*, because the variance was not between a matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record.

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First, the recital of the act of Parliament shews clearly, that it was only intended to apply to cases where the variance was not material or essential to the merits of the case. It could not be the intention of the Legislature that the act should apply to a case where the whole defence and the course of pleading of the defendant might be affected. The defendant might be able to justify one word, and not the other. Would the act apply if the variance was between charging a man with a felony and a misdemeanor? The defendant might be able to justify one, and not the other. In the present case the matter was very material to the issue between the parties; and the defendant might have resorted to a different line of pleading and defence, if the words sought to be introduced upon the record by way of amendment had been contained originally in the declaration.

Secondly, there was no matter in writing produced in evidence. This expression, according to the ordinary acceptation, must be taken to mean producing the document and giving it in evidence. In the present case there was merely parol evidence; and different witnesses gave different accounts of the words, which shew the difficulty and inconvenience that would arise if the Court could amend from parol testimony. In *Briant v. Eicke* the copy of the record was properly amended by Lord *Tenterden*, as matter in writing produced in evidence. The case of secondary evidence of a copy has been put; but that is not a case similar to the present case, in which there was no writing of any description produced in Court. Such copy would probably not be within the statute, as it can only be secondary evidence, though an examined copy of the record is primary evidence, and the proper proof of a judgment; and therefore *Briant v. Eicke* is quite consistent with the doctrine, that neither a copy, (when admissible as mere secondary evidence), nor parol evidence, is within the meaning of the statute in question.

BAYLEY, B.—It seems to me that this rule ought to be made absolute. The first question is, whether this is a variance or not. The libel, as stated upon the record, imputes to the plaintiff “mismanagement or ignorance.” The words, according to the evidence of one of the witnesses, were, that, “from his ignorance or inattention,” &c. It has been argued by the counsel for the plaintiff, that mismanagement and inattention are necessarily identical; but I am of opinion that they are not identical. Mismanagement goes farther than inattention, and may include many cases which inattention would not include. Mismanagement may be wilful; and many cases might be put where you would draw the distinction between the two, and say this is not a case of inattention, but of gross mismanagement. Upon the ground that mismanagement goes higher than inattention, and includes cases which inattention does not, I am of opinion that the evidence did not support the declaration. That brings me to the question, whether the variance was amendable under the 9 Geo. 4. I may admit that there may be a greater necessity for the power of amendment, and a greater probability of a variance in a case where there is no copy, and the plaintiff has to rely on parol evidence, than in a case where matter in writing exists; but we are to see whether the Legislature have used language which would authorize a Judge to amend, not from a written instrument, but from the oral testimony of witnesses. Where you have a written document you can see what the writing is, and ascertain at once with certainty what the amendment ought to be; but where the proof is by oral evidence, there may be, and in this instance there actually were, several versions of the libel in evidence. This may have been the reason of the Legislature confining the power of amendment to the case of matter in print or writing, and they may have thought it more prudent and cautious so to limit the power of amendment. In this case one witness gives one version,

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and a second gives a different version. By which are you to amend? They are differing as to the contents of a written instrument, and it is impossible to say which is correct. But let us look at the language of this act of Parliament, and see whether there is sufficient to satisfy our minds that it was the intention of the Legislature that the Judge at *Nisi Prius* should have the power to amend where there is no matter in writing in evidence, but the party calls parol evidence to prove the contents of a written document. The preamble recites, that "expense is often incurred, and delay and failure of justice takes place at trials, by reason of variances between writings produced in evidence and the recital or setting forth thereof upon the record." From the preamble it appears, that the mischief to be remedied is a variance between a writing produced in evidence and the record. To come within the mischief recited, then there must clearly be a writing produced in evidence. Then what is the provision of the enacting part? "Where any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record, &c., the Judge may amend." In what case, then, can you amend? In the case only where there is a variance between some matter in writing or in print produced in evidence, and the setting forth, &c. Now, in *Briant v. Eicke*, Lord *Tenterden* held, that you might amend by an examined copy of the record of a judgment, because he considered that copy to be in the same situation as if the original judgment had been produced, and that it was identical with it. He said, "The examined copy of the former judgment is a matter in writing so produced, and the statute, therefore, authorizes the amendment." In that case there was a matter in writing identical with and following the tenor of the original record; here there is nothing in writing, but you must ascertain what the amendment is to be from the fallacious and differing memories

of several witnesses. I think that the present case is not within the statute; and that the true construction of the act of Parliament is, that the Judge cannot amend unless a writing is produced in evidence, by which writing you are to amend. I think, therefore, that the present rule for a nonsuit should be made absolute.

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VAUGHAN, B.—We must look at the act of Parliament to see whether it gives any authority to a Judge at *Nisi Prius* to make an amendment in a case of this nature. It seems to me to be framed with peculiar care on this point. Throughout the act, both in the preamble and in the enacting part, the words, “writing produced in evidence,” are used. The object seems to have been to confine the provision of amendment to cases where there was matter in writing by which to amend. With respect to the question, whether there was a variance, I am of opinion that the words “mismanagement” and “inattention” are not synonymous. The one is active, the other passive; the one denotes commission, the other omission. If the libel, as set out on the record, had imputed inattention merely, and not mismanagement, the defendant might have chosen to put a justification on the record.

BOLLAND, B.—I am of opinion that there was a variance in this case; the words “mismanagement” and “inattention” may have very different meanings.

Then arises the question whether this variance could be amended by the statute, which gives a Judge power to amend certain discrepancies at the time of the trial? The object of the act seems to me to have been to correct those clerical errors which may have arisen in setting out written documents on the record. Looking at the statute, I cannot suppose that the accurate mind of the very learned person who framed this act of Parliament could have lost sight of the distinction between proof by matter in writing and by parol, because he must have

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been perfectly aware that, in many cases, a writing set out on the record is proved by parol evidence. If he did intend to include the latter case, would he have used the expression *produced* in evidence; would he not rather have said *proved* in evidence?

The language used in the act of Parliament seems to me to mean, that there must be an actual production in Court of a matter in writing or print, to which the Judge may apply his visional organs, and which, if it does not agree with the record, he may amend. The present case shews how difficult it would be to apply the provisions of the statute to cases of variance when the testimony is oral. There were several different versions of the libel in evidence, and by which was the learned Judge to have amended? I am of opinion, therefore, that the rule for a nonsuit in this case should be made absolute.

GURNEY, B.—It is impossible to doubt but that the mischief may be much more extensive than the remedy provided for by this act of Parliament. We, however, must look at the language of the statute, which seems framed studiously for the purpose of limiting the power of amendment to a case where there is matter in writing or in print produced in evidence, by which to amend. It is not necessary, for the determination of the present case, to decide whether a case, in which secondary evidence in writing, is produced, would fall within the provisions of the act of Parliament.

Rule for a nonsuit absolute.

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WILSON v. TUCKER.

THE declaration in this case was delivered early in the term. The defendant's time for pleading having expired, he delivered a general demurrer, which was obviously for delay, on the evening before the last day of the term.

The defendant's time for pleading being out on the evening of the last day but two before the end of term, he delivered a general demurrer for delay. The Court, on the last day of the term, granted a *concilium* for the rising of the Court, and then gave judgment for the plaintiff, refusing to let the defendant in to plead.

Butt, on the last day of the term, applied for a *concilium* for the rising of the Court, which the Court granted, and ordered the rule to be drawn up accordingly. At the rising of the Court, *Cowling* applied to withdraw the demurrer, and to be let in to plead, but the Court refused to grant any indulgence in such a case, and gave—

Judgment for the plaintiff.

M'ALPINE v. POLES.

IN this case the Master allowed the plaintiff the expense of witnesses from and back to *Brussels*.

R. V. Richards obtained a rule for the Master to review his taxation, on the ground that since the late act, 1 *Will.* 4, c. 22, the witnesses might have been examined upon interrogatories, under a rule of Court, and that it was, therefore, unnecessary to have incurred the expense in question.

It is a question for the discretion of the Master, in each particular case, whether the expenses of witnesses brought from abroad should be allowed on taxation. The act 1 *Will.* 4, c. 22, for the examination of witnesses on interrogatories, has made no alteration in this respect.

Erle shewed cause, and contended that the plaintiff was not bound to forego the advantage of the *vivâ voce* testimony of his witnesses, and cited *Tremaine v. Barret* (a), and *Tremaine v. Faith* (a).

(a) 6 Taunt. 88.

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R. V. Richards, in support of the rule, stated, that he did not dispute that the law was as settled in the cases referred to before the recent act for examining on interrogatories; but the question was, whether that act did not make the expense of bringing over the witnesses unnecessary?

Lord LYNTHURST, C. B.—It is frequently very desirable that a party should be able to have his witnesses examined *vidé voce*. It appears to us, that the allowance of such witnesses is still a matter in the discretion of the Master, in each particular instance, just as it was before the late act. It is very desirable that the practice on such a point should be uniform, and therefore we will consult the Judges of the other Courts upon the subject before we dispose of this rule.

Upon a subsequent day the judgment of the Court was delivered by

Lord LYNTHURST, C. B.—We have conferred with the Judges of the other Courts on the question, as to the effect of the late act for the examination of witnesses upon interrogatories, upon the costs of witnesses brought from abroad, and they agree with us in the opinion which we have formed, that the act of Parliament makes no difference in this respect. We think that the matter is in the discretion of the Master, subject to be reviewed by the Court; and we think, that, in this particular instance, that discretion was properly exercised in allowing the expense of the witnesses. The learned Judge who tried the cause thought it a case where the presence of the witnesses was peculiarly desirable. The rule must therefore be discharged.

Rule discharged.

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ASSUMPSIT for money had and received. Plea—the general issue. At the trial, before *Denman, C. J.*, at the last Spring Assizes for the county of *Warwick*, it appeared that the *Warwick* and *Birmingham* cricket clubs had agreed to have a match at cricket on the following terms:—

A match at cricket for 20*l.* is within the meaning of the sect. 2 of the 9 Anne, c. 14, and therefore illegal. And an action for money had and received to recover back the sum deposited may be maintained against the stakeholder, who has paid over the money after notice not to do so.

“The *Birmingham* Union Club agree to play at *Warwick* on *Monday* next, *October* the 8th, a match at cricket for twenty sovereigns a side with the *Warwick* club. A deposit of 5*l.* is placed in the hands of Mr. *Terrill*, on behalf of the *Warwick* club. Wickets to be pitched at ten; to begin at half past ten, or forfeit the deposit. Wickets to be struck at half past five, unless the game is finished before. To be allowed to change three men according to the list sent this morning.

“J. COOKES,

“H. TERRILL.

“A deposit of 5*l.* is placed in Mr. *Terrill's* hands on behalf of the *Birmingham* club.”

The parties met accordingly on the 8th of *October*; two umpires were appointed, and the remaining 15*l.* was deposited by each party with the defendant as stakeholder. The 20*l.* paid on behalf of the *Birmingham* club was paid for them by the plaintiff, as their agent. The game was played to the end of the first day, when the *Warwick* club was sixteen runs ahead, and had eight men to go in. No objection was then made to any of the players. On the following morning the *Birmingham* club objected to one of the *Warwick* eleven, stating that he belonged to another club, and refused to play out the game. The wickets were pitched, and the umpire appointed by the

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Warwick club called "play" at eleven o'clock. The *Birmingham* club, however, refused to play out the match, and the plaintiff gave the defendant notice not to pay over their deposit to the *Warwick* club, but to repay it to him.

Before the commencement of this action the whole of the money was paid over by *Terrill* to the *Warwick* club, on their entering into an agreement to indemnify him. The learned Judge nonsuited the plaintiff; but gave leave to move to enter a verdict for 20*l.* if the Court should be of opinion that the action was maintainable.

Humfrey having in the last term obtained a rule accordingly—

Goulburn, Serjt., and *Hill*, shewed cause.—The plaintiff is not entitled to recover the deposit, as the contract was not illegal. The statute 9 *Anne*, c. 14, does not make contracts relating to gaming void, but *securities* given to enforce them. The words of the first section are, "That all notes, bills, bonds, judgments, mortgages, or other securities whatsoever, given, granted, or entered into by any person whatsoever, where the whole or part of the consideration of such securities shall be for any money, or other valuable thing whatsoever, won by gaming, or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or betting on such games, &c., shall be utterly void." That was the only point before the Court in the case of *Jeffreys v. Walter* (a), which was an action of debt on a bond given as a collateral security for money won by betting at cricket; and though the Court inclined to think cricket was a game within the first section, and that the security was void, yet no judgment was given. That, however, was clearly within the statute, as it was the security that was sought to be enforced. [*Bayley*, B.—It is not essential that the game

(a) 1 Wils. 220.

should be an illegal game]. At common law, unless the game was unlawful, the contract would not have been void; and this statute only makes void securities given to enforce the payment of the gambling debt. The games to which the statute applies are not such as the common law would take notice of and prohibit as being *mala in se*. This was not, therefore, money paid on an illegal consideration. [*Bayley*, B.—It is the amount that makes betting illegal by the statute; and a game may be legal, yet a security given to enforce the payment of a debt on it may be illegal, as a foot-race. *Lynal v. Longbothom* (a)]. That was an action on the statute, but it is submitted that there the money could not have been recovered back in an action at common law. There are many authorities which shew that the contract is not void, though the security given to enforce it would be so. *Barjeau v. Walmsley* (b); *Robinson v. Bland* (c); *Vaughan v. Whitcomb* (d); *Walpole v. Saunders* (e); *Alcinbrook v. Hall* (f). Unless the plaintiff, therefore, brings himself within the 2nd section of the statute, he cannot recover. The words are, “That any person or persons whatsoever who shall at any time or sitting, by playing at cards, dice, tables, or any other game or games whatsoever, or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any one or more person or persons, so playing or betting, in the whole the sum or value of 10*l.*, and shall pay or deliver the same, or any part thereof, the person or persons so losing and paying or delivering the same shall be at liberty, within three months then next, to sue for and recover the goods so lost and paid or delivered, or any part thereof, from the respective winner and winners thereof, with costs of suit, by

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(a) 2 Wils. 36.
(b) 2 Stra. 1249.
(c) 2 Burr. 1077.

(d) 2 N. R. 413.
(e) 7 D. & R. 130.
(f) 2 Wils. 309.

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action of debt founded on this act." Those words have received a construction in *Thistlewood v. Craycroft* (a); and it was there held that money fairly lost at play could not be recovered back in an action of debt for money had and received, not founded on the statute. That these games are not *mala in se* is quite plain, or the Queen's palace would not have been excepted out of the act, as it is by the 9th section. In *Hastelow v. Jackson* (b), where the action for money had and received was held to lie, there is the distinction, that, in that case, it was a boxing match, which was illegal at common law. *Hunt v. Bell* (c). Can it be contended that before the statute a wager at common law was *per se* illegal? [*Bayley, B.*—The question is, whether, where a person loses 10*l.* at play, the stakeholder is justified in paying over the money after notice?] *Thistlewood v. Craycroft*, it is submitted, is this very case; where it was held that money fairly won could not be recovered in this form of action. [*Bayley, B.*—The point there decided was, that money fairly lost at play, and paid over, could not be recovered except by proceeding under the statute. If you had proved that the money had been paid over by the stakeholder, before he had notice that the other party objected, this would have been like that case].

But the plaintiff cannot recover, because cricket is not one of the games included in the second section. The games mentioned in the 1st and 2nd sections consist of two distinct descriptions. By the 1st section, whether it is at games of skill or chance that the money is lost, it is against the policy of that section that the security should be enforced. But it is singular that games of skill are omitted in the 2nd section, the words being cards, dice, tables, or other game or games

(a) 1 M. & S. 500.

(b) 8 B. & C. 221.

(c) 1 Bing. 1.

whatsoever; and, according to the general rule stated by *Holroyd, J.*, in *Rex v. Whitnash* (a), "that preceding particular words control subsequent general words," the words "and other game or games whatsoever" must be construed to mean "games *ejusdem generis* with those previously mentioned." But, even if this be a game within the statute, then, as the statute nowhere avoids the contract, the party who seeks to recover must pursue the statutable remedy. If the Legislature had intended to avoid the contract, they would have expressly done so, as in 16 *Car. 2*, c. 7. But, if the contract is illegal, even the rule, *in pari delicto, potior est conditio possidentis* applies. *Howson v. Hancock* (b); *Vandyck v. Hewitt* (c). The 5th section is inapplicable, as that refers only to cases where the money has been fraudulently won.

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The Court, without hearing *Humfrey* in support of the rule, were proceeding to give judgment, when a doubt suggested itself whether the money could be considered "as lost at any time or sitting," within the words of the 2nd section, as the game was not decided till the second day, and they desired *Humfrey* to address himself to this point.

Humfrey.—The act does not say on one day, but "at any time or sitting." A horse-race, though not decided until after three heats, would be within the statute. [*Bayley, B.*—There are cases which shew that different sittings, if on the same day, though at intervals, may be taken as one. *Bones v. Booth* (d). If the company do not part, it is one sitting]. The money is lost at one time, namely, on the second day. [*Bayley, B.*—But it is the transactions of

(a) 7 B. & C. 601.

(b) 8 T. R. 575.

(c) 1 East, 96.

(d) 2 Black. Rep. 1226.

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two days that produce the loss]. The words "any time or sitting" are not to be so strictly considered, or otherwise the Legislature would have used the same phrase as in section five, where the words are, "any one time or sitting."

He was then stopped by the Court.

BAYLEY, B.—I was stating the reasons which influenced my judgment the other day, when I was interrupted by a doubt, which struck my mind on coming to certain words in the act of Parliament, and it occurred to me that I ought to stop for the purpose of taking time to consider their effect; that occasioned us to delay the delivering of our opinion, and I am now ready to go on. The first question was, whether where a party has deposited a sum of money exceeding 10*l*. with a stakeholder, to abide the event of a match at cricket, the game for that stake is illegal? We are of opinion, on full consideration, that it is. The words of the second clause of the statute have been held, in many cases, to be as comprehensive as those in the first, although the former mentions the game of tennis and bowls, and the latter does not: that is the reasonable construction of the clause, and admits of no doubt, and both have been decided to apply to foot-races, although not mentioned in either clause. The Court, therefore, see no reason for confining the operation of the words to games of chance only, but are of opinion that the statute applies to other games. The title and preamble of the statute express the object to be the preventing of excessive gaming, that is, the restraining gaming for stakes higher than the sum thereby fixed, by making such gaming illegal. Then the question is, whether the second section, being connected with the first, enables the plaintiff to recover from the stakeholder the money which

he had deposited with him, before the stakeholder had paid it over to the other party? The statute says, that, "if persons losing the sum or value of 10*l.*, by any of the aforesaid games, shall pay or deliver the same, or any part thereof, they shall be at liberty, within three months then next, to sue for and recover the same from the winner, with costs of suit, by action of debt." If, therefore, the loser pays the money lost, he may recover it back within three months, but he must proceed by the special mode pointed out by the act, that is, by action of debt, within the limited period; but, if the loser pay, and does not bring an action within the time appointed, the Legislature has provided other means for its recovery. There are provisions in the act which are sufficient to satisfy any reasonable mind that it was intended to make it improper to pay; the Legislature meant to prevent the practice; and for that purpose the act provides, that, if the loser does not bring an action within the limited time, any other person may sue the winner for the same, and treble the value, with costs of suit, one moiety for himself, and the other for the poor. Then follows a provision in the third section, that every person liable to be sued shall be compellable to discover, on oath in Chancery, the sum lost. Now I am of opinion that it is impossible to read the whole of the provisions without seeing that it was the intention of the Legislature, that, when stakes to that amount should be lost, they should not be paid to the winner. It follows, therefore, as a necessary consequence, that the money may be stopped in the hands of the stakeholder; and, if so, the depositor may recover it back from him by action for money had and received. In this case there was a dispute whether the money was lost or not, but the Court do not found their opinion on that. We take it for granted that the money was lost, but the stakeholder, having been directed not to pay it over,

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was bound not to do so, and, after that notice, did it in his own wrong. Then it was suggested in argument, that, if the plaintiff had any right, his only remedy was by action of debt, to be brought against the winner, and within three months. But we must look at what the action is: it is not against the winner, and therefore the form is not necessarily debt, nor is it limited to three months. Where a party has money put into his hands to pay to another, which it would be illegal in the other to receive, the person placing it there would have a right to stop it, and prevent the holder, by due notice, from paying it over to the other, and he might recover it by the ordinary remedy for obtaining possession of money belonging to him in the hands of another. The form of action therefore is right and proper. It was suggested in argument, that if the stake was illegal the deposit was equally illegal, and that the maxim *melior est conditio possidentis* applied. In *Hastelow v. Jackson* (a) the wager was clearly illegal, the subject of it being a boxing match, and yet there it was held that the plaintiff was entitled to recover from the stakeholder, who had paid over the money after notice, his own stake, as money had and received to his use. That shews that the right of the party making the deposit to recover back the money was not taken away by reason of the illegality. At present I have said nothing about the point which was the occasion of our staying the delivering of our judgment. It was an objection which had not occurred to counsel, who were not likely to have overlooked it if well founded, which presented itself to my mind; but for which, on further consideration, I am convinced there was no foundation. The words are, "who shall lose, &c., at any time or sitting;" and, as this game was not over in one day, I had considered that they did not apply in this case; but on deliberation I am satisfied.

(a) 8 B. & C. 221.

that those words must be taken to mean nothing more than one transaction, as if the bet had been, as was suggested by my brother *Bolland*, to go 1000 miles in 1000 hours. Such a wager must necessarily take up more time than one day, and there is no doubt that, if the stakes were illegal as to the amount, they would be recoverable. In *Bones v. Booth* (a), *Blackstone, J.*, puts the proper construction on the statute; he says, "to lose 10*l.* at one time is to lose it by a single stake or bet; at one sitting, to lose it in a course of play, when the company never part, though the person may not be actually gaming the whole time."

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VAUGHAN, B.—The question here turns not on the legality of the game, but on the amount of the stake rendering it illegal. The words of the statute are so large as to include every species of play, and the object of it was, not to put down the game, but the illegal betting. The words of the first section of the statute apply only to rendering securities given to secure a sum lost at play void, but the words of the second section apply expressly to all games whatsoever where the party loses, by playing or betting, to the amount of 10*l.* at one time or sitting. The fifth section applies to a case where the winners have been guilty of fraud and cheating, and does not apply to a case like the present. Another question here is, whether the action for money had and received can be maintained. The cases of *Robinson v. Mearns* (b), and *Bate v. Cartwright* (c), are authorities to shew that the action for money had and received lies against a stakeholder, if the money be demanded before he pays it over; and in *Robinson v. Mearns*, *Holroyd, J.*, says, "The right of the party to recover back a deposit does not depend upon whether the wager be illegal and void, or whether it be won or lost; but upon whether the stakeholder has received it

(a) 2 Bl. Rep. 1226.

(b) 6 D. & R. 26.

(c) 7 Price, 540.

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on an illegal consideration, for if he has he is bound to refund it."

BOLLAND and GURNEY, Bs., concurred.

Rule absolute.

WEBB v. LAWRENCE.

The mistake of *Lawrance* instead of *Lawrence*, in the name of the defendant in a writ of *capias*, is immaterial. It is sufficient in a writ of *capias* to describe the defendant as of *Kent Street*, in the county of *Surrey*.

A writ of *capias* was indorsed "Bail for 40*l.* and upwards, by affidavit:"—*Held* sufficient.

There need not be a date to the indorsement on the writ of *capias*.

THE *capias* in this case described the defendant as *Lawrance* instead of *Lawrence*, and it went on to describe him only as "of *Kent Street*, in the county of *Surrey*." The indorsement upon the *capias* had no date, and the part of the indorsement which relates to bail was, "Bail for 40*l.* and upwards, by affidavit."

Mansel having obtained a rule for setting aside the *capias*, and discharging the defendant out of custody, on these, amongst other grounds, cause was now shown by

Crowder, who contended, *first*, that the variance in the letter was immaterial, the name being *idem sonans*; *secondly*, that the form in the schedule of the Uniformity of Process Act requires no such particularity of description of residence of the defendant, it being merely "C. D., of ——" ; *thirdly*, that the form of indorsement with respect to bail is also complied with—the form given by the schedule is "bail for £ by affidavit," and here the blank is filled up with the words 40*l.* and upwards; and, *lastly*, that no date is required by the schedule to be indorsed upon the writ.

Mansel, *contrà*, admitted that he could not support the rule on the first ground, as the name in the *capias* was *idem sonans* with the real name of the defendant. He contended, that the objection to the residence of

the defendant not being sufficiently stated was fatal, and referred to the schedule as to the writ of summons, which is required to contain the place and county where the defendant resides—"To C. D., of —, in the county of —, greeting;" and he argued that this particularity was of much more consequence in the case of a *capias* than in that of a summons; that here neither the number, street, nor parish was mentioned, and that the description as of *Kent Street*, in the county of *Surrey*, was much too vague. As to the third objection, he said that it was quite uncertain for what sum the bail was to be taken; and that the indorsement on the writ was bad as a direction to the officer, as it left it uncertain for what amount he was to take bail. As to the last objection, he argued that the date should be on the indorsement, and that it was always so in practice.

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Lord LYNTHURST, C. B.—The first objection is abandoned. With respect to the second, I am of opinion that the form in the schedule is sufficiently complied with by describing the defendant as of *Kent Street*, in the county of *Surrey*; a place and county are given, and the act does not require the number of the house or the parish to be specified. With regard to the objection as to the marking for bail, it is clear that the defendant could not have been held to bail for more than 40*l.*; and I think that the form in the act is sufficiently complied with in that respect. As to the objection that there is no date on the indorsement, upon reading No. 4, in the schedule, it is clear that no such date is requisite.

The rest of the Court concurred, and the rule was—

Discharged, with costs.

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ROBERTS v. BARKER.

A tenant held under the terms of an expired lease, by which it was stipulated that the tenants on quitting the farm should not sell or take away any of the manure in the fold, but should leave it to be expended on the land by the landlord or his succeeding tenant. The lease contained no stipulation as to the tenant being entitled to payment for such manure.

By the custom of the country, the tenant would have been bound not to sell or take away the manure in the fold, but to leave it to be expended on the land by the landlord or his succeeding tenant, and would have been entitled to be paid for the same:—*Held*, that, as an express stipulation had been made on the subject, the custom was excluded, and that the tenant was not entitled to be paid for the manure.

ASSUMPSIT for goods sold, work and labour, tillages, &c. Plea—General issue, and a set-off for rent, and use and occupation. At the trial before *Alderson, J.*, at the last *Lent* Assizes for the county of *York*, the following appeared to be the facts of the case. The plaintiff was a farmer, and occupied a farm belonging to the defendant, which he had taken to on the death of his father, in 1829. The father originally held under a lease granted to himself and a Mr. *Bamforth*, in 1794, for twenty-one years, which contained a condition that they (the defendants), on quitting the farm, should not sell or take away the manure which should then be in the fold, but should leave it to be expended on the land by the landlord or his succeeding tenant. The custom of the country where the lands lay was, that the outgoing tenant was to be bound to leave the manure in the fold, and was entitled to be paid for it by the landlord or his succeeding tenant. On the plaintiff quitting the farm, in 1831, there was manure in the fold of the value of 33*l.* 12*s.*, and the action was brought to recover that amount, and a further sum of 75*l.*, the balance of the valuation of the tillages. The defendant claimed, under his set-off, 75*l.* for half a year's rent; and the question on that point was as to the termination of the tenant's year, and as to his being bound to pay rent up to *Lady-day*, he having quitted the land at *Candlemas*, and the homestead on *May-day*. At the trial all the facts were admitted; and the learned Judge nonsuited the plaintiff, with leave to move to enter a verdict for the plaintiff for 32*l.* 12*s.* if the Court should be of opinion that the plaintiff was entitled to be paid for the manure; and for the sum of 108*l.* 12*s.* if they should be of opinion, also, that he was not liable to pay rent up to *Lady-day*.

The principal question (a) was, whether the words in the lease, binding the tenant to leave the manure in the fold, to be expended on the land by the defendant or his subsequent tenant, excluded the custom of the country, for an outgoing tenant to be paid for the manure in the fold.

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John Williams obtained a rule for entering a verdict for the plaintiff, against which cause was shewn by—

Pollock and Milner, who relied on *Webb v. Plummer* (b).

John Williams and *Heaton*, *contra*, relied upon *Wigglesworth v. Dallison* (c), and *Senior v. Armitage* (d).

Cur. adv. vult.

The judgment of the Court was now delivered by—

LORD LYNDHURST, C. B.—The question as to the defendant's demand for rent was determined upon the argument. The only point remaining for consideration was, the claim to the value of the manure left by the plaintiff upon his quitting the farm. It was admitted on the trial, that the off-going tenant was bound, by the custom of the country, to leave the manure on the premises, and was entitled to be paid for it by the landlord or the succeeding tenant; but in this case the parties did not rely on the custom. They made this a subject of express stipulation. The original lease contained a covenant, that the tenant on quitting the farm should not sell or take away the manure which should then be in the fold, but should leave it to be expended on the land by the landlord or his succeeding tenant. It is to be left for their use, and there

(a) The Court disposed of the question as to the rent upon the argument.

(b) 2 B. & A. 746.

(c) 1 Doug. 201.

(d) Holt, N. P. C. 197.

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is no provision as to any payment in respect of it. It was contended, that the stipulation to leave the manure for the use of the lessors was not inconsistent with the tenant's being paid for what was so left; that the custom to pay for the manure might be ingrafted upon the engagement to leave it for the use of the lessors. But, if the parties meant to be governed by the custom in this respect, there was no necessity for any stipulation, as, by the custom, the tenant would be bound to leave the manure, and would be entitled to be paid for it. It was altogether idle, therefore, to provide for one part of that which was sufficiently provided for by the custom, unless it was intended to exclude the other part. We are of opinion, therefore, that the plaintiff was not entitled to be paid for the manure, and the rule must be discharged.

Rule discharged.

PAYNTER v. WILLIAMS.

A pauper whose settlement was in the parish of *A.* resided in the parish of *B.*, and whilst there received relief from the parish of *A.*, which relief was afterwards discontinued, the overseers object- ing to pay any more unless the pauper removed into his own pa- rish. The pau- per was sub- sequently taken ill and attended

ASSUMPSIT on a surgeon's bill. The plaintiff, a surgeon, had attended in the parish of *St. Florence* a person legally settled in the parish of *Gumfreston*, and the defendant was one of the parish officers of the latter parish. The pauper had for some time resided in the parish of *St. Florence*, and had formerly received relief, whilst residing there, from the parish of *Gumfreston*, which had been dis- continued, and he was told that they would give him no further allowance whilst he remained out of his own parish. He was afterwards taken ill, and for eight or nine weeks was attended by the plaintiff. After the plaintiff's attend.

by an apothecary, who, after attending him nine weeks, sent a letter to the overseers of *A.*, upon the receipt of which they directed the allowance to be renewed, and it was continued to the time of the pauper's decease:—*Held*, that the overseers of *A.* were liable to pay so much of the apothecary's bill as was incurred after the letter was received.

ance had continued thus long, a letter from the plaintiff was sent by the pauper's wife to the overseers of *Gumfreston*, the contents of which did not appear, but the overseer said the attendance began before the letter came; the result, however, was, that the overseers ordered the allowance for maintenance to be renewed, and it was continued to the time of the pauper's death. At the trial before *Patteson, J.*, at the last Spring Assizes at *Pembroke*, the plaintiff was nonsuited, with liberty to move to enter a verdict for the amount of the bill, or such part as the Court should think proper. A rule having been obtained accordingly—

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E. V. Williams shewed cause.—In this case there is no express promise from the defendant to pay the bill, and, as the parish in which the party had a settlement was under no legal obligation to provide medical assistance for him during illness, whilst he was residing in another parish, the law will not raise an implied promise. *Watson v. Turner* will, perhaps, be cited on the other side; but, in fact, that case is an authority to shew, that, where there is only a moral consideration, there must be an express promise. It is three times reported in *Bull. N. P. (a)*; but it appears in the first report only that the pauper resided out of the parish to which he belonged. The case, therefore, has often been cited without adverting to that fact; and has been discussed as if there had been both a legal and moral obligation, which would have been the case if the pauper had resided within the parish. But since, as appears by the first report, in fact the pauper, in that case, resided out of the parish, there was a moral consideration only, and, if there had been no express promise, the action could not have been maintained. The decision of *Watson v. Turner* was regarded in this light by the Court

(a) Pages 129, 147, & 231.

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in *Atkins v. Bamwell* (a), where it was expressly decided that the law will not raise an implied promise, in the parish where the pauper is settled, to reimburse the money laid out by the other parish, in which he happened to be, in providing medical assistance for him. And Lord *Ellenborough*, advertent to the fact, that in *Watson v. Turner* there was a special promise to pay the plaintiff's bill after it was contracted, says, "The last circumstance makes all the difference. A moral obligation is a good consideration for an express promise; but it has never been carried farther, so as to raise an implied promise in law." But, in every other case, it has been held that a legal as well as a moral obligation is necessary. *Lamb v. Bunce* (b), and *Tomlinson v. Bental* (c), were all cases of casual poor, where the parishes sought to be charged were under a legal obligation to provide for accidental illness. *Wing v. Mill* (d), is the only authority the defendant has to contend with. [*Bayley*, B.—The action there was not against all the overseers, but against the one who made the promise]. The remarks of Lord *Ellenborough* and *Bayley*, J., as to the overseer having, by his acknowledgment, subjected the parish to a legal obligation, are extrajudicial, because there was, in that case, both a moral obligation and an express promise. The receipt of relief, during illness, cannot distinguish this from the other cases; since the passing of the 35 *Geo.* 3, c. 101, s. 2, which enables justices to make an order of removal, and suspend it if it should appear that the poor person is unable to travel by reason of sickness, and that the charges incurred by the suspension shall be paid by the officers of the parish to which he is ordered to be removed, it is the fault of the officers of the parish where a pauper is residing if they choose to maintain him whilst he remains there, because the overseer

(a) 2 East, 504.

(b) 4 M. & S. 275.

(c) 5 B. & C. 738.

(d) 1 B. & A. 104.

may obtain an order and suspend it, and, by a second order, may get the expenses incurred during the suspension. The overseers of *St. Florence* ought here to have relieved themselves in this way. If there had been a legal duty on the overseers of *Gumfreston*, an indictment would lie for not performing that duty; but no indictment could here have been maintained against them if the pauper had died for want of medical aid when he was not in their parish. Besides, a question of settlement cannot be tried in an action like the present. [Lord *Lyndhurst*, C. B.—If medical attendance is necessary, the overseers are bound to provide it; they might indeed require him to be first removed]. That is applicable to the overseers of the parish in which the pauper is at the time. *Le Blanc*, J., says, in *Atkins v. Banwell* (a), “There was a moral as well as a legal obligation to maintain the pauper in his illness in the parish where he was at the time.” If any legal presumption is raised by giving medicines to a pauper, so it would from giving other necessities; but it cannot be said, that if an overseer of a parish allowed a certain sum per week to an out-parishioner, and the overseer in which he lives allows more, that he could maintain an action for the surplus. The legal obligation exists only where the pauper is in the parish. *Secondly*, if there be a legal obligation, do the circumstances raise an implied assumption? In *Lamb v. Bunce*, the overseer frequently visited the pauper; and in *Tomlinson v. Bentall*, the churchwarden directed a doctor to be sent for. Those were circumstances from which a promise to pay would necessarily be implied. Here there is no retainer by the defendant from which any such implied promise can be inferred. [Lord *Lyndhurst*, C. B.—After the surgeon had commenced his attendances there was a communication by letter from the plaintiff, and there is no repudiation; is not that enough?

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(a) 2 East, 506.

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Bayley, B.—The demand is not entire. There may be a claim on the parish officers for what was incurred after that letter, though the surgeon was not entitled to it before]. This differs from the ordinary cases of casual poor, which are cases of accidents happening to a person whilst in a parish in which he is not settled, and are cases in which immediate attention is essential; here the parish might have contested their liability, or sent their own surgeon. In *Lamb v. Bunce, Le Blanc, J.*, states, that the plaintiff was in the habit of attending the parish poor; therefore, he was not a stranger, but a person pointed out by the parish as the person to attend to this duty, and it was from that circumstance that the presumption of a previous request arose: it did not arise from the legal obligation or the mere knowledge that the plaintiff had attended.

J. Evans, and Whitcombe, contrà.—The argument for the plaintiff will be confined to the question of legal liability, because the Court will, probably, be of opinion, that, if a legal liability is established, the circumstances are sufficient to raise an implied promise. If the Court are not prepared to overrule the case of *Wing v. Mill* (a), it must govern the present case. It has been said on the other side, that it was only necessary to throw overboard the *dicta* of the learned Judges in that case; but, if there was no legal liability to supply the pauper with medical attendance in that case, then the decision was wrong. The principle seems to be, that where the illness of the pauper is permanent, and does not proceed from such an accident as compels the parish in which the accident happens to relieve him as casual poor, the overseers of the parish where he is settled are liable, if they know of a surgeon attending him, and do not interfere to forbid such attendance. It has been said, that no persons can be con-

(a) 1 B. & A. 104.

sidered as casual poor in the parish where they are permanently resident, but that such persons only are casual poor as are in the parish without the intention of remaining. [*Bolland*, B.—I think that the definition of casual poor cannot be so confined. In *Rex v. Chatham* (a), Lord *Ellenborough* lays down the rule much wider]. In *Nolan's Poor Laws* (b), the definition of casual poor is thus given:—"When a poor person, not settled in a parish, becomes chargeable, from accident, sudden calamity, or any other circumstance, he falls within the description of casual poor." [*Bayley*, B.—If he had been removed to his own parish, then the parish officers and surgeon would have had an opportunity of seeing and considering what necessary medical attendance he required. Is there any obligation in a parish to pay any man who, without their knowledge, is called in to attend?] Whether or not, there is a legal liability for surgical attendance without having had a previous knowledge that it was required; there is here evidence to shew, that the officers knew of the medical attendance. All the cases where moral obligation has been mentioned were equally cases of legal obligation. There is no moral obligation, distinct from legal obligation, which attaches on overseers. If any class of persons were without a legal claim to relief, there might be a moral obligation; but the liability depends on statute, which is a legal liability; and every one has a right to claim relief, either where he resides or in the parish where he is settled. There has been a misunderstanding of the term "moral obligation," as distinct from legal obligation. The term "moral obligation," as applied to cases of this sort, was introduced by *Watson v. Turner* (c). That has been considered as an authority that an express promise upon a moral obligation will support an assumpsit. But the case of *Watson v. Turner* has been very considerably doubted;

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(a) 8 East, 498.

(b) Vol. 2, p. 437.

(c) Bull. N. P. 129.

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and in a note to the case of *Wennall v. Adney* (a), the learned Reporters treat it as erroneous, and endeavour to account for the origin of the mistake. The term "moral obligation" was probably used in *Watson v. Turner* in contradistinction to "no moral obligation," not to a legal obligation: distinguishing it from a case where there is an obligation, and where there is none. Now, what obligation can there be in *Watson v. Turner*? It was an action brought by an apothecary against the overseers of a parish for the cure of a pauper "who boarded with her son out of the parish." She was suddenly taken ill, and her son called in the plaintiff, who attended her four months. After the cure, the overseer was applied to, and promised to pay the plaintiff's bill. The Court said, that, "though there was no precedent request from the overseers, yet the promise was good, notwithstanding the Statute of Frauds; for overseers are under a moral obligation to provide for the poor." It is cited by Mr. Serjeant *Williams*, in *Wennall v. Adney*, as a case of legal liability, "because they were bound by law to provide for the poor." *Atkins v. Banwell* was a case of casual poor, and there *Le Blanc, J.*, says, "There was a moral as well as legal obligation to maintain the pauper in his illness in the parish where he was at the time;" and Lord *Ellenborough* says, "A moral obligation is a good consideration for an express promise, but it has never been carried farther, so as to raise an implied promise in law." [*Bayley, B.*—In reality Mr. Justice *Le Blanc* thought that the parish in which the pauper was settled was under no legal obligation to pay the other parish for medical assistance where a sudden illness occurs there]. *Wing v. Mill* was a case of legal obligation, and it would have been of no importance that the plaintiff was desired to make out his bill to *Wil-*

(a) 3 B. & P. 249.

loughby parish, unless there had been such legal obligation, for it would have been *nudum pactum*. It is clear from the reasoning used by the Court, that they would have come to the same conclusion, although there had been no express promise: with the exception of the express promise, the present case exactly resembles *Wing v. Mills*. The fact of relief distinguishes this case from *Atkins v. Banwell*, and brings it within the decision in *Wing v. Mill* (a). [Bayley, B.—It does not follow that, because pay is allowed from his own parish for a pauper in another, that his own parish would have been bound to pay for medical attendance without an express promise]. But it shews a legal obligation, and then the recognition by the overseers after the receipt of the letter is tantamount to an express promise. *Lamb v. Bunce* (b), and *Gent v. Tomkins* (c), were both cases of casual poor. In *Gent v. Tomkins* it was [held that] the parish to which the pauper belonged was under no obligation, but that the parish in which he lay ill was liable. It appears that the reason given was, that he was casual poor in the parish in which he was residing, and that they were therefore bound to find him with medical assistance; and, in short, that it was *nudum pactum* as regarded the other parish. [Bayley, B.—The Court granted a new trial on the ground that the damages ought to be confined to the subsequent attendance on the faith of the promise]. *Wing v. Mill* is sustainable only on the ground of legal liability; for if that were taken away, then the argument of the learned person who moved for a new trial would have been unanswerable. *Copley*, Serjt., there states the true ground: “The poor laws are mere arbitrary enactments, and do not carry moral obligations beyond the legal liability, which in this case attached on the parish which was the residence of the pauper.” That case pro-

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(a) 1 B. & A. 104. (b) 4 M. & S. 275. (c) 1 D. & R. 541.

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ceeds on the ground of its being a legal obligation. The previous cases proceed on the same ground. The question here then is, whether the present is the case of a moral or a legal obligation? During the twelve months that the plaintiff attended the pauper, the illness was a gradual decay; after the plaintiff had attended some time there is a notice given by him to the overseers; there is no doubt, therefore, as to the knowledge of the defendant that the plaintiff attended after he had received the letter; and the sum of 13*l.* 1*s.* was incurred after that time. [Lord *Lyndhurst*, C. B.—It is a remarkable circumstance that the sum originally allowed for maintenance is discontinued, then the letter is written, and after that the overseers renew the allowance; is not that as much as to say, that the pauper is to remain where he is? I think that a legal obligation arose out of that transaction. If the pauper cannot be removed, then the obligation is on the parish where the pauper is residing as casual poor; but if the parish where the pauper is settled desire that he shall not be removed, then a legal liability attaches on that request.]

LORD LYNDHURST, C. B.—I am of opinion that there ought to be a verdict entered for the plaintiff for so much of this bill as was incurred after the letter was sent by the pauper's wife. I come to this conclusion on the special and peculiar facts of this case. From the facts of the case it appears that the pauper, being settled in the parish of *Gumfreston*, had resided for some time in the parish of *St. Florence*; that he had during that time had an allowance from his own parish; that allowance was afterwards discontinued, the overseers saying they would not pay him any more unless he removed into his own parish. He was afterwards taken ill, and attended for nine weeks by the plaintiff; then a letter is taken over to the overseers of the parish of *Gumfreston* by the pauper's wife, and they directed the allowance to be renewed, and it was continued

to the death of the pauper. They know, therefore, of the pauper's being there; that, in my opinion, amounts to a request on the part of the officers that the pauper should not be removed, and to a promise that they will allow what was requisite. They knew by the same letter of the plaintiff's attendance. This, in my opinion, was an acceptance of the plaintiff's services, and created a legal liability.

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BAYLEY, B.—I am of opinion that the parish is liable, and that the plaintiff can maintain the present action. The legal liability is not alone sufficient to enable the party to maintain the action, without a retainer or adoption of the plaintiff on the part of the parish. The legal liability of the parish does not give any one who chooses to attend a pauper and supply him with medicines a right to call on them for payment. It is their duty to see that a proper person is employed, and they are to have an option who the medical man shall be. *Wing v. Mill* does not go the length of saying that a mere legal liability is enough; there must be a retainer or adoption. In that case the parish officers were aware of the attendance, and sanctioned it, because they applied to him to send in his bill. In this case it appears that the pauper resided in the parish of *St. Florence*, and belonged to the parish of *Gumfreston*, which for some time relieved him in the other parish. They afterwards, however, discontinued this relief. Subsequently, medical attendance became essential, and the plaintiff attended at first without an order from the parish: and in doing so, acted at his own peril. But after eight or nine weeks a letter is sent by the plaintiff to the parish officers of *Gumfreston*—what its contents are we do not know, but there is no difficulty in discovering what the tenor of it was. It is sent to *Williams*, the defendant, who was one of the overseers of *Gumfreston*; that letter is not now to be found; but we may look to the acts

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of the parties to know what it contains. The overseers of *Gumfreston* renewed those payments which they had formerly made to him, and therefore they acquiesced in his remaining in the parish of *St. Florence*. They no longer desire the pauper to be removed, and they ought to have restrained the plaintiff from attending, or appointed a surgeon of their own; but neither is done. That raises the inference that they had agreed not only to maintain the pauper, but that they had adopted the plaintiff as the medical attendant. Therefore, I am of opinion that the plaintiff is entitled to recover to the extent of 13*l.* 1*s.*, the amount incurred since the letter was sent. There is another circumstance to shew that *Williams* had received the letter, because he says, when asked to pay, that "the attendance began before the plaintiff wrote to me." He seems to have considered that the contract was entire, and that he was not liable for any part.

VAUGHAN, B., and BOLLAND, B., concurred.

Rule made absolute for entering a verdict
for 13*l.* 1*s.*

DOE on the Demise of ANN MEYRICK v. MARY MEYRICK,
Widow.

A. being possessed of considerable estates, which were his old family es-

EJECTMENT brought by the lessor of the plaintiff, as devisee under the will of *William Meyrick*, clerk, to re-

tates, and having also purchased several estates for money considerations, and exchanged several parts of the family estates for other lands, and amongst others for the estate in question, devised as follows: "I give and devise all my messuages, tenements, mills, lands, rents, hereditaments, and real estates whatsoever, which I have heretofore from time to time 'purchased' from different persons in the several deeds and conveyances thereof named, &c., to my sisters *A. M.* and *E. M.*."—*Held*, that the estate which the testator had obtained in exchange passed to his sisters under this devise as part of the purchased estates.

cover the possession of a farm called *Galanddu*, in the county of *Anglesey*. A verdict was taken for the plaintiff by consent, subject to the opinion of the Court on the following case :—

The Reverend *William Meyrick* was the owner of considerable estates in the county of *Anglesey*, and, before the making of the will hereafter mentioned, purchased for money considerations several estates in the same county, the yearly rents of which purchased estates amounted at the time of his death to 100*l.* a year. He likewise exchanged several parts of the family estate for other lands; and amongst the rest he exchanged certain messuages and lands with one *Holland Griffith*, for a farm called *Galanddu*, being the premises in question, which were situate in the parish of *Llanfechell*, and which, by indenture dated the 12th of *November*, 1796, *Griffith*, in consideration of certain lands to be conveyed by *Meyrick*, and of 30*l.* to be paid by *Meyrick*, conveyed to him in fee. The sum of 30*l.* mentioned in the deed was not paid as the value of the premises comprised therein, but merely to balance and equalize the exchange. Upon the execution of the indenture of the 12th of *November*, 1796, the said *Holland Griffith* and *William Meyrick* entered respectively into possession and receipt of the rents and profits of the said exchanged premises, and the said *Holland Griffith* is still in the possession and receipt of the rents and profits of the premises given him in exchange; and the said *William Meyrick* entered into and continued in possession and receipt of the rents and profits of the said premises in the said indenture mentioned, called *Tyddyn Gil* and *Galanddu*, and continued in possession of the said premises called *Galanddu* until the time of his death, which happened on the 15th of *October*, 1819. The said *William Meyrick* made his will, dated the 25th day of *June*, 1816, which was duly executed and attested in such manner as is required for passing real estates, and which said

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will, as regarded his real estates, was in the following words :
 " I give and devise all and every my several messuages, tenements, mills, lands, rents, hereditaments and real estate whatsoever, situate in the several parishes of "*Llanfechell*," *Llanrhwydrys*, *Llanrhyddlad*, *Llanphangelynhwynyn*, *Llanfairynenbull* and *Henegluy*s, or elsewhere, in the county of *Anglesey*, which I have heretofore from time to time "*purchased*" from different persons in the several deeds of conveyances thereof named, and which are now vested in me in fee simple, or in some other person or persons to and for my use and benefit, unto and to the use and behoof of my two sisters, *Ann Meyrick* and *Elixabeth Meyrick*, and their assigns, in equal shares, for and during the term of their joint and natural lives, and for the life of the survivor of them ; and from and after the end, expiration, or sooner determination of either and both of these estates, by forfeiture or otherwise, in their lifetimes or the lifetime of the survivor of them, then to the use and behoof of the Reverend *Lewis Hughes*, and *John Jones*, the younger, of *Beaumaris*, gentleman, and their heirs, during the joint and natural lives of my said two sisters, and during the life of the survivor of them, in trust to support and preserve the contingent uses and estates herein-after limited from being defeated or destroyed, and for that purpose to make entries, and bring actions as occasion shall be and require, but nevertheless to permit and suffer my said two sisters, or their assigns, and the survivor of them, and her assigns, to receive and take the rents, issues, and profits of the several messuages, tenements, mills, lands, rents, and hereditaments, for their use, in equal shares, during their joint natural lives, and for the life of the survivor of them ; and from and immediately after the decease of the survivor of my said two sisters, I give and devise all that messuage or tenement, farm, lands, and hereditaments and premises, with the appurtenances thereto belonging, called by the name of *Lucy*, otherwise called *Tyd-*

dyn Lucy, situate in the parish of *Llanfechell* aforesaid, now or late in the occupation of *John Parry*, his under-tenants or assigns, and all my estate, right, title and interest in and to the same, (being *part* and parcel of my *purchased* real estates aforesaid), unto and to the use and behoof of my friend *Robert Pritchard*, gentleman, his heirs and assigns, for ever; and as to, for, and concerning the remainder of all those the aforesaid real estates, by me heretofore purchased as aforesaid, I give and devise the same and every part and parcel thereof unto and to the use and behoof of my dear brother *Thomas Meyrick*, his heirs and assigns, for ever." The tenement called *Lucy*, otherwise *Tyddyn Lucy*, devised by the said will, was purchased by the said *William Meyrick* for a money consideration. The said *William Meyrick* died on the 15th of *October*, 1819, seised of the estate called *Galanddu*, without revoking his will, leaving the said *Thomas Meyrick*, his only brother and heir-at-law, and his said two sisters *Ann* and *Elixabeth*, him surviving. The said *Elixabeth Meyrick* died on the 21st of *June*, 1821, leaving her brother her surviving. Upon the death of the said *William Meyrick*, the said *Thomas Meyrick* came into possession and receipt of the rents and profits of the said premises called *Galanddu*, and continued so until the time of his death, which took place on the 27th of *January*, 1831; and the defendant *Mary Meyrick*, the widow and devisee of the said *Thomas Meyrick*, has ever since his death continued in adverse possession and receipt of the rents and profits of the said premises called *Galanddu*, for the recovery of which premises this ejectment is brought by the said *Ann Meyrick*, the lessor of the plaintiff, as devisee as aforesaid of the said *William Meyrick*, against the defendant *Mary Meyrick*, as devisee of the said *Thomas Meyrick*. The question for the opinion of the Court is, whether the said premises called *Galanddu*, conveyed to the said *William Meyrick* as above-mentioned, passed by

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Follett, for the plaintiff.—The question is as to the meaning of the word “purchased?” There are two modes of acquiring land, *viz.* by descent, or by purchase. *Littleton* says in his *Tenures*, s. 12, “Also, purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh not by title of descent from any of his ancestors, or of his cousins, but by his own deed.” And Lord *Coke* in his commentary upon that says, “A purchase is always intended by title, and most properly by some kind of conveyance, either for money, or some other consideration, or freely of gift; for that is in law also a purchase. But a descent, because it cometh merely by act of law, is not said to be a purchase; and accordingly the makers of the act of Parliament in 1 Hen. 5, c. 5, speak of them that have lands by purchase or descent of inheritance. And so it is of an escheat or the like, because the inheritance is cast upon or a title vested in the lord by act in law, and not by his own deed or agreement, as our author here saith.” There is no question, therefore, that the word *purchase* applies to lands which a man has got by any other means than by descent or by operation of law. There is nothing on the face of the will to shew that the testator used the word in other than the legal sense. The only difficulty is, whether “purchased” means *legal purchase* or *land bought*? If there is nothing in the will to shew that the testator meant to use the words in other than the legal sense, the lands would pass by the will to the plaintiff. The question is, whether, where you find the word “purchased” in a will, it must not be taken in the legal sense, unless you find something there to shew that the testator meant to use it in another sense? It is evident that this will was drawn by a lawyer; and the fair inference from that is, that whatever

the testator took by conveyance was intended to pass. The rule is this, that words in wills or deeds must be taken *primâ facie* to be used in their legal sense, unless there is something to shew that the testator intended otherwise. There is here something more than the word "purchased." The words are, "which I have heretofore from time to time purchased from different persons in the several deeds of conveyances thereof named, and which are now vested in me in fee simple," &c. What reason is there that he should use those words, unless he intended to include all lands conveyed to him by deeds of conveyance? If there be a doubt as to the legal meaning of the will, the legal meaning of the words must be taken. [Lord *Lyndhurst*, C. B.—Suppose a word has a popular meaning, and a technical meaning, in which must it be read?] *Primâ facie* in a technical sense. The word "purchased" has a strict legal meaning. Besides, the testator refers to the etates purchased "in the several deeds of conveyances named, and vested in him in fee." It is quite clear that those words would include the lands conveyed to him in exchange.

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Lloyd, contrâ.—If the word "purchased" had a clear legal meaning, like the word "heir," the *onus* of shewing that they were intended to be used in a different sense might be thrown on the defendant. But the word "purchased" has a popular meaning, not like the word "heir," which has a strict legal meaning. In common parlance the word "purchased" means "bought." The testator had a family estate, and other lands which he had bought, and he makes the distinction between his family estates and the lands which he had bought with his savings. It is quite clear that he intended that his brother *Thomas Meyrick* should have the family estate. Those acquired from his own savings he gives to his sisters. The devise as to *Tyddyn Lucy* shews what he means by the word "purchased." He there uses the same word, and that was un-

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Remembrancer to take an account of the duties due and payable to his Majesty from the said *John Hixon*, as such executor as above-mentioned, for or in respect of the legacies or residue given and bequeathed by the will of the said *John Pigott*, with the usual directions; and that the former order should, in the meantime, be enlarged.

By the affidavits it appeared that the testator, *John Pigott*, died in or about the year 1812, and by his will he made *Joseph Mumby* his executor (who duly proved the will), and bequeathed him 3,000*l.* and the residue of his personal estate, after payment of his other legacies; no duty had been paid on that and two other legacies. The effects of *John Pigott* were sworn under 15,000*l.*: *Joseph Mumby* died 7th March, 1816, leaving his widow, *Jane Mumby*, sole executrix of his will, who duly proved the same. His effects were sworn under 6,000*l.*, and he gave all his personal estate to his widow, the said *Jane Mumby*: *Jane Mumby* died 23d August, 1819, leaving *James Saunders*, *Robert Sandwith*, *William Pearson*, and *John Hixon*, her executors, who duly proved her will; her personal estate was sworn under 3,000*l.*: *Saunders* and *Sandwith* died in the lifetime of *Pearson*, who died 17th of December, 1831. Sums had been paid on account of legacy duty, down to January, 1832, by one *Joseph Mumby*, a son of *Joseph* and *Jane Mumby*. On the part of the executor *Hixon* it was sworn that *Pearson*, until shortly before his death, had alone administered the effects of *Jane Mumby*, and that *Hixon* had not interfered further than by signing documents; that he had no knowledge of the property or effects of *Jane Mumby*, and that no assets of *Jane Mumby* or of *John Pigott* had ever come to his hands.

W. H. Watson, on behalf of the executor, shewed cause.—The Court will not make an order under 42 Geo. 3, c. 99, s. 2, for two reasons: *First*, *Hixon* has no assets of *John Pigott's*; and, *secondly*, it is discretionary in the Court to

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make this order or not; and, after so great a delay, they will not do so. On the first point: the duty sought to be enforced by the Crown in this case is imposed by 36 *Geo. 3*, c. 52, ss. 6 & 35, by which, when an executor is entitled to retain for a legacy or the residuum due to himself, the duty then shall be a debt due to the King; and by 42 *Geo. 3*, c. 99, s. 2, the Court of *Exchequer* is empowered to grant a rule to shew cause why the executor should not deliver an account, upon oath, of all legacies respectively paid or administered "*by him, her or them,*" and why those duties have not been paid. It is not necessary to contend, perhaps it is impossible to do so, that an executor of an executor is not within this statute, but it is essentially necessary to make out, on the part of the Crown, that the executor has had assets. Now it appears here, that *Hixon* never has had assets in his hands; and no rule is more clear in Courts, both of law and equity, than that one of several executors is only chargeable for assets actually coming to his own hands; and if this order were made, it would be charging him with assets which he never had: for it appears that *Hixon* never had assets. From the circumstance of *Joseph Mumby's* estate being bequeathed to his executrix, and sworn under 6,000*l.*, and her personalty being sworn under 3,000*l.*, an inference is attempted to be drawn that *Mrs. Mumby's* executors had assets of *Pigott*; now the duty was a debt due from *Mumby* or from *Mrs. Mumby*, and, therefore, the nonpayment by them would only amount to a *devastavit* in one of them, although *Mrs. Mumby* as executrix of her husband, or *Hixon* as her executor, may, under 30 *Car. 2*, c. 7, and 4 & 5 *W. & M.* c. 24, s. 12, be liable for the *devastavit* of their testator. [*Bayley, B.*—And then only *de bonis testatoris*]. 1 *Saund.* 219, *e, f*, n. 8, is an authority to that effect; and therefore, unless *Hixon* has assets, the case is carried no further. It is true this present rule is only to account; but the Court will not

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make an order unless some case be made out. *Secondly*, the stat. 42 Geo. 3, c. 99, leaves it discretionary in the Court to make the order or not, as they are to act "on such affidavits as they consider sufficient," and to make the rule absolute in every case in which it may appear necessary, &c. Now, although in suits, laches is not imputable to the Crown, yet, on a summary application, the Court will leave the Crown to its ordinary remedy, especially when such a time as twenty years have elapsed, a period of time after which a bond is presumed to be satisfied, and a right of entry is barred.

Amos, for the Crown.—The present application is only to account; and if *Hixon* has no assets, it will be so found, and he will not be charged with the duties. To shew that there are assets, *Mrs. Mumby's* personal estate passed to her executors, which was sworn under 3,000*l.*, and this is chargeable with the present duties. Moreover, duties have been paid on the legacies down to the present time, which is an admission that there are assets. [*Bayley*, B.—But those were not paid by *Hixon*]. It must be inferred that they were paid with his privity, as they were paid by a party claiming under *Mrs. Mumby's* will. The statute is to be put in force by the Court whenever they are satisfied the duties are unpaid. The Crown may have had good reason for not enforcing them sooner, and the lenity of the Crown is not to be urged against them now. The executor of an executor is in the same situation with respect to the acts for enforcing the legacy duties as the original executor. [*Bayley*, B.—But here you have an executor who has not received assets; ought we in such a case to enforce a clause which leaves the exercise of the power in our discretion? The inquiry prayed for is attended with considerable expense, and we ought not to send this party before the Remembrancer, unless we are satisfied that something will probably be forthcoming. The Crown ought

to have the means of enforcing the duties; but my difficulty here is, that this party does not appear ever to have intermeddled with the estate, and the Crown is now calling on him to account for duties which have accrued more than twenty years]. The delay originated from a suit in equity; but, at all events, the Crown cannot be prejudiced by delay, and no laches can be imputed to it.

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BAYLEY, B.—In this case we are called on to exercise the discretion with which we are invested by the 42 *Geo.* 3, c. 99, s. 2, and which I think we ought not to exercise in this particular case so as to compel this executor to account. The provision in the statute is, that in every case in which executors, &c., shall not have paid, &c., within proper and reasonable time, it shall be lawful for this Court to grant a rule, &c.; and to make such rule of Court absolute, in every case in which the same may appear to the Court to be proper and necessary, for the better enforcing the payment of any of the said duties. Now the words, “proper and reasonable time,” only apply to the executors, &c., not having paid the duties within a proper and reasonable time; and there is nothing in the act which, in terms, limits the discretion of the Court as to the time in which an application of this kind ought to be made. But, without any such words, it seems to me that we must exercise our discretion so as to require the application of this notice to be made within a reasonable time; and that we should require some explanation of the delay to be shewn upon affidavits, in cases where a very long time has elapsed. Now here the application is to account for duties and residue under the will of *John Pigott*, who died in 1812, and made *Joseph Mumby* his executor. *Mumby* died in 1816, leaving his widow, *Jane Mumby*, his executrix, and she died in 1819, leaving *Hixon*, the person against whom this application is made, and three others, her executors. The defendant is now the only surviving executor of *Jane Mumby*. One

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of the three executors, who died, had acted up to 1831, and had managed the estate solely for some time before that year when he died. It appears that *Hixon* never has acted, and that he has received no assets. It is sworn, that his only interference has been in signing necessary documents; and that he has no knowledge of the estate of *Jane Mumby*, and that no assets of *Pigott* ever came to his hands. I think, under these circumstances, that it would be an unreasonable exercise of our discretion, if we were to force this person to account, at considerable expense, and the rule, therefore, must be discharged.

VAUGHAN, B.—I am of the same opinion. I think that the circumstances stated in the affidavits disclose a satisfactory answer to the application; and I think that it would be making the act an engine of oppression if we were to enforce its provisions under the circumstances brought before us in the affidavits, made in opposition to this rule.

The rest of the Court concurred, and the rule was discharged.

ALLEN and Another, Assignees of CHARLES BAKER, a
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A. contracted, in consideration of 220*l.* 10*s.*, to sell and plant a quantity of trees on *B.*'s land; and also that *A.* should and would, at his own costs and charges, well and sufficiently keep in order the trees aforesaid for two years after the planting, and that such as should die during that period, (except from injury by sheep, game or cattle), should be replaced by him." In an action to recover the price, the jury thought that the words "keep in order" meant to prune only, and did not extend to weeding and clearing the ground, and they found their verdict accordingly. The Court, thinking this an improper construction, granted a new trial.

Held, also, that evidence of non-performance by *A.* of any part of the contract on his part was admissible in reduction of damages.

agreed, that they, or one of them, should and would, during the then present autumn, procure, sell, and plant 70,000 plants or trees, of the sort, description and kind therein mentioned, in and upon certain lands of the defendant; and also, that they, the said *C. Baker* and *James Allen*, should and would, at their own costs and charges, *well and sufficiently keep in order the trees aforesaid for the space of two years next after the planting thereof, and that such of them as should die during such period of two years aforesaid, (save and except from injury by sheep, game and cattle),* should be replanted in the proper seasons for such purposes, that is to say, in the autumn of the year 1829, and again in the autumn of the year 1830, by them the said *C. Baker* and *James Allen*, and at their like costs and charges, with trees or plants of a similar sort or description, respectively, as those so dying as aforesaid; and the defendant promised and agreed to and with the said *C. Baker* and *James Allen* to pay them for the said plants or trees, and for planting and keeping the same as aforesaid, the sum of 220*l.* 10*s.* in manner following, *viz.* 147*l.*, being two-thirds thereof, within the space of one month next after such planting as aforesaid should be finished and completed; and the further sum of 73*l.* 10*s.*, being the remaining one-third thereof, at the expiration of the said period of two years, during which the said *C. Baker* and *James Allen* had thereinbefore agreed to *keep in order and replace the said trees in manner aforesaid.* There were also counts for goods sold, and work and labour. The defendant pleaded the general issue. At the trial before *Parke, J.*, at the last Spring Assizes for the county of *Gloucester*, it was proved that the trees were supplied by *Baker*, the bankrupt, according to the agreement, and that 5000 additional trees were sent in the fall of the year 1829, and 3000 in 1830, to replace such as had died. There was no notice given by the defendant to *Baker* to supply any more plants, and no complaint was

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made that the number supplied was insufficient. It was admitted that the first instalment had been duly paid.

The defendant offered to prove, in answer, that many of the trees had been destroyed by being choked up with grass and weeds, and that the whole plantation was not worth 5*l.*; and insisted that the bankrupt had not performed his contract well and sufficiently to keep the trees in order, which meant that the bankrupt was to weed the ground, and prevent the trees from being choked up. The learned Judge was of opinion, that this evidence was not receivable, on the authority of *Campbell v. Jones*(a); but he told the jury, that, in his construction of the contract, the bankrupt ought to have kept the ground in order, at the same time leaving it as a question to the jury what was the meaning of the stipulation in the agreement—"well and sufficiently to keep in order," and they found that it meant to prune only, and did not extend to weeding and clearing the ground about the plants, and they found a verdict for the plaintiffs for 73*l.*

Maule, in *Easter Term*, having obtained a rule for a new trial, on the ground that the jury had put a wrong construction on the agreement, and that evidence of improper treatment of the plantation by *Baker* ought to have been received in evidence in reduction of damages—

Talfourd, Serjt., and *Justice*, now shewed cause.—*First*, the agreement is, "well and sufficiently to keep in order the trees aforesaid, for the space of two years next after the planting thereof, and that such of them as should die within that period should be replanted." If to "keep in order" meant the general management, it would not have been necessary to provide specially that the trees which died should be replaced; and the conduct of the defendant puts a construction on the agreement, for he

(a) 6 T. R. 570.

gave no notice to the bankrupt to come and weed the plantation, not even when the additional trees were sent. The undertaking by *Baker*, to keep the trees in order for two years, was only *part* of the consideration for the defendant's promise to pay the price agreed upon; and the principle is correctly laid down by Mr. Serjt. *Williams*, in 1 *Saund.* 320 *b*, that "where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant by the defendant, without averring performance in the declaration;" and he cites *Boone v. Eyre* (a), and adverts to the case of *Campbell v. Jones* (b), on which the learned Judge founded his opinion at the trial. That case is an express authority in favour of the correctness of the ruling at *Nisi Prius* in the present case. There it was agreed, between *C.* and *D.*, that, in consideration of 500*l.*, *C.* should teach *D.* the art of bleaching materials for making paper, and permit him, during the continuance of a patent, which *C.* had obtained for that purpose, to bleach such materials according to the specification; and *C.*, in consideration of the sum of 250*l.* paid, and of the further sum of 250*l.* to be paid by *D.* to him, covenanted that he would, with all possible expedition, teach *D.* the method of bleaching such materials, and *D.* covenanted that he would, on or before the 24th of *February*, 1794, or sooner, in case *C.* should before that time have taught him the bleaching of such materials, pay to *C.* the further sum of 250*l.* In covenant by *C.* against *D.*, the breach assigned was the non-payment of the 250*l.* The defendant demurred, because it was not averred that *C.* had taught *D.* the method of bleaching such materials; but it was held by the Court that the whole consideration of the agreement being, that *C.* should

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(a) 1 H. Bl. 273, n. (a).

(b) 6 T. R. 570.

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permit *D.* to bleach materials as well as teach him the method of doing it, the covenant by *C.* to teach formed but part of the consideration, and *D.* might recover a recompence in damages for the breach of such covenant. And *C.* having in part executed his agreement by transferring to *D.* a right to exercise the patent, the latter ought not to keep that right without paying the remainder of the consideration, because he may have sustained some damage by *C.*'s not having instructed him, and the demurrer was over-ruled. And Mr. Serjeant *Williams* states the reason of those decisions to be, that, where a person has received a *part* of the consideration for which he entered into the agreement, it would be unjust, that, because he has not had the *whole*, he should therefore be permitted to enjoy that part without paying for it; and he adds (*a*), "Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration." That shews not only that the plaintiff is entitled to recover the whole price agreed upon, but also,

Secondly, that evidence of any default of the plaintiff's, such as that he did not keep the trees in order pursuant to the agreement, assuming that to be the meaning of it, was not admissible in reduction of damages, but that the defendant is driven to a cross action. [*Bayley*, B.—*Campbell v. Jones* was a case of covenant. It was settled by *Street v. Blay* (*b*), that when the plaintiff has been guilty of a breach of the contract on his part, the defendant has a right to insist on a reduction of damages on that account? In that case a person, who had purchased a horse warranted sound, sold it again, and then repurchased it; and it was held that though he could not, on discovering that the horse was unsound when first sold, require the original vendor to take it back again, nor resist an action by such

(*a*) 1 Saund. 320 *d.*

(*b*) 2 B. & Ad. 456.

vendor for the price, yet that he might give the breach of warranty in evidence in reduction of damages]. In *Street v. Blay* there was a warranty extending over the whole contract, which distinguishes that case from this. That case was similar to *Poulton v. Lattimore* (a), which was an action to recover the price of seed warranted to be good new growing seed, and it was held that it was competent to the buyer to shew in reduction of damages that it did not correspond with the warranty. [Bayley, B.—Where there is a contract to do certain work and labour at a fixed price, is the plaintiff to have the whole price without completing the whole contract?] It is submitted that he is, or the consequence will follow, that, on the most trifling default, the whole matter would be open, and the party would be absolved from paying the specific sum he agreed to pay. But even if it were not necessary for the defendant to give the plaintiff notice of the default in performing his part of the contract, the defendant should have made his objection when the plaintiff had the means of proving that he had executed it properly. *Hopkins v. Appleby* (b). There barilla was objected to as being of an inferior quality to the warranty; and Lord *Ellenborough* says, “It was incumbent on the defendants to give the seller an opportunity of establishing his case by the opinion and judgment of intelligent men upon the subject, and not to throw a veil and obscurity over it, and debar the party from the fair means of ascertaining the quality. By giving notice in an early stage, the plaintiffs would have been enabled to send down a person to examine it.” Here the default should have been noticed during the early years of the growth of the trees; it was too late when the action was brought. [Bayley, B.—Was what Lord *Ellenborough* said laid down as a rule of law, or was it not to guide the conduct of the jury?] In *Gronig v. Mendham* (c), which was an action for the price of

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(a) 9 B. & C. 259. (b) 1 Stark. N. P. C. 477. (c) 1 Stark. 257.

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clover seed sold by sample, the defendant contended that the seed delivered did not accord with the sample; but it was held, that, before he could go into such a defence, he must prove that he gave notice of his objection to the plaintiff. [*Bayley, B.*—The authority of that case may, perhaps, be considered as shaken by *Poulton v. Lattimore*].

Maule, contrà.—*First*, evidence of the non-performance, or imperfect performance of the plaintiff's contract, was receivable in mitigation of damages. The case of *Campbell v. Jones*, which was relied on at the trial, is distinguishable. In that case there was an absolute covenant to pay on a given day, and the declaration was redundant, as it would have been sufficient if it had stated that the defendant covenanted, and then averred that he had not paid. It was on a specialty, and it was therefore not necessary to aver performance of the condition, or to shew the consideration, because in a specialty the consideration is implied. That case is not analogous to the present case, which is an action of *assumpsit* on the common count for goods sold, and work and labour. In *assumpsit*, a defective performance of the agreement may be given in evidence, in mitigation of damages; and in that action an averment and proof of consideration are necessary. Suppose here, that *Baker* had delivered only a part of the 70,000 trees agreed for, and of an inferior description, is he to recover the price agreed to be paid for the whole? It is submitted that the agreement to plant, and to keep the trees in order, is a condition precedent to his recovering the *whole* money. [*Bayley, B.*—If there is a covenant to pay an entire sum, on the performance of a condition precedent, a party cannot recover a part without proof of the condition performed.] *Fisher v. Samuda*(a)

(a) 1 Camp. 190.

shews that the defendant in the present case could not have brought a cross action, on the ground of the imperfect performance of the contract on the part of *Baker*, and that the bad quality of the article supplied can and ought to be given in evidence either as an answer to the whole demand, or in abatement of the damages. [*Bayley*, B.—*Street v. Blay* goes almost the whole length of this case.]

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Secondly, assuming that the non-performance of the contract on the part of *Baker* was admissible in evidence, he failed to perform his duty in not taking away the grass from the roots of the plants. The bankrupt undertakes that there shall be 70,000 trees in good order at the end of two years, and therefore he undertakes to do every thing to keep them in good order, and keeping them clean so as to prevent them from growing up sickly was a main part of the contract. Keeping in order could never have been intended to be confined to pruning; for who ever heard of pruning trees at so early an age as two years? [*Bolland*, B.—If pruning only was meant, why should it not have been made use of, because it is a term well known and understood? The stipulation, “save and except damage done by cattle,” &c., shews that *Baker* was to provide against damage from all other causes.] *Maule* was then stopped by the Court.

BAYLEY, B.—The Court entertain no doubt that there ought to be a new trial in this case. There are two questions, *first*, whether the jury have put a proper construction on the agreement? and *secondly*, whether the evidence was properly rejected, and whether the plaintiff must recover the whole sum, or whether the defendant is entitled to a reduction on the failure of the plaintiff to do all that he undertook? The agreement is, “that the plaintiffs shall and will, at their own costs and charges, well and sufficiently keep in order the trees aforesaid for the space of two years next after the planting thereof; and that such of them as shall die during such period of two years afore-

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said (save and except from injury by sheep, game, and cattle) shall be replanted in the proper seasons for such purposes." Now what is the meaning of the words, "well and sufficiently keep in order?" It is desirable that another jury should state their opinion of what they mean. I think you cannot be said to keep trees in order unless you remove what impedes their growth; if there is any foulness, or any thing by which nutriment is withheld, they are *prima facie* not kept in order. I should not have thought that the price ought to have been taken into consideration any more than the amount of premium in a policy can be looked to in order to ascertain the risk insured against; *Gabay v. Lloyd (a)*; unless keeping in order had been an equivocal expression; but in this case the price must be an ingredient from which a construction of such an agreement as this may be come at. If it is clear that the value of the 70,000 trees would nearly exhaust the full sum, I think that a reason for considering, where there is an equivocal expression, that the trees only were meant; but if the price of the trees would amount to a proportion only of the sum agreed on, then the surplus must be for something. I think the price is an ingredient in the construction of an agreement in which equivocal words are used, and, therefore, that it is desirable that another jury should determine what is the true construction. *Secondly*, Is the plaintiff liable to an abatement from the amount agreed on in respect of misconduct on his part, or non-fulfilment of what he is bound to perform? The case of *Street v. Blay* puts this in a plain and satisfactory point of view, not leaving the defendant to a cross action to recover for the diminution in value, by reason of the plaintiff's non-performance of the contract, but entitling him to deduct the amount of damage he has sustained thereby. That is a very plain and intelligible rule, and the present case shews the wisdom of it. The agreement is to pay £204. 10s.

(a) 3 B. & C. 793, 5.

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plants of a particular description, if kept in order; and plants of less value are introduced, or the trees are not in order, the vendee is not driven to his cross action, had a right to say, if the trees had been what they ought to have been, they would have been worth that sum; they were not. That sum, less by the difference in value of the trees as supplied, and by their not being kept in order, is the true amount of the plaintiff's claim, and the value only is to be recovered; so that if by the plaintiff's neglect they are worth nothing, he has no claim for price: he is entitled to compensation only for what he really supplied and done, and not for any thing beyond. The verdict, however, was not perverse, and therefore the trial must be on payment of costs.

AUGHAN, B.—I am of the same opinion. I think the question of price was a material ingredient in forming a proper construction of the contract. The contract was to be performed for £200. 10s. Now, if the value of the trees, and the planting and pruning would not amount to somewhere near that amount, it would be natural to say, that something more must have been intended to be done. I think the rule, that there should be an abatement of price for the non-performance of any part of a contract by the plaintiff, is a convenient rule. I think, however, that this was not a perverse verdict, but arose from the failure or mistake of the jury.

HOLLAND, B.—I agree with the Court, that there ought to be a new trial. But what has been said as to the price not to be taken into consideration in forming a construction of a contract, does not meet with my concurrence; because a party may enter into a contract, and undertake to do work for much less than its value; as a young man may enter into a contract to build a bridge more in a view to fame than profit. I think it, therefore, a dangerous doctrine, that the price may be introduced into the consideration of the construction of

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this agreement. I think that the words, "keep in order," ought to be taken with reference to the subject-matter of the contract; and whether it is to be pruning only, or keeping the roots clear, it must be done, if the words imply it, although the value of the trees alone may equal the whole price agreed to be paid.

GURNEY, B., concurred.

BAYLEY, B., added, I should certainly think that the price was not admissible in construing the agreement, had it not been that there was an ambiguity in it.

Rule absolute.

NORRIS v. WILLIAMS and Others.

A., being possessed of an old vessel, sent her to *B.*'s yard to be repaired. *B.* agreed to find timber for the repairs, and materials were accordingly supplied by *B.* and other persons to the amount of 200*l.* The vessel was repaired in *B.*'s yard with the above materials, but no work was done upon her by either *B.* or the other creditors. On the vessel being advertised for sale, *B.* and the other persons insisted that she should not be removed until they were paid. *A.*'s agent assented, and said they should be paid out of the purchase-money, and signed an authority to the auctioneer to that effect. The sale then proceeded, and the vessel was knocked down to *C.* for 300*l.* Immediately after the sale, *B.* and the other creditors applied to *C.* for payment, and he promised that he would, on the following *Thursday*, bring the purchase-money for the auctioneer to pay the creditors with. *C.* did not do so:—*Held*, that the agreement for payment of the repairs out of the purchase-money, of which *C.* was cognizant, and had assented to, precluded him from maintaining trover until such payment was made.

TROVER for a ship.—At the trial, before *Bayley*, B., at the last Assizes for *Anglesey*, the following appeared to be the facts of the case:—

The vessel in question was, previously to the sale to the plaintiff hereafter mentioned, the property of one *William Wright*, of *Liverpool*. She was an old vessel cut down, but whether British or foreign built did not appear. In *July*, 1828, *Wright* sent her to *Conway* to be repaired and altered; and she was placed for that purpose in the yard of the defendant *Williams*, a ship-carpenter at *Conway*. *Williams* agreed with *Wright* to supply timber for the repairs, and he, the other defendants, and various other persons, did accordingly supply materials to the amount of 200*l.* and upwards. She was repaired in *Williams's* yard

with the materials so furnished, but no work was done upon her by *Williams* or the other defendants. The materials not being paid for, the parties became clamorous for their money, and insisted that the vessel should not be removed till they were paid. In *November*, 1828, *William Wright* advertised the vessel for sale, and she was accordingly sold by auction, by one *Jones*, in *Williams's* yard, on the 1st *December*. On that morning, before the sale, the defendants, and the other persons, having claims for the repairs, applied to *Thomas Wright*, the brother of *William*, and who attended to superintend the sale for him, for the settlement of their claims, and demanded that the vessel should not be taken away till they were paid; *Williams's* attorney presenting a distinct claim on his behalf. *Thomas Wright* assented, and said they should be paid out of the purchase-money, and signed an authority to the auctioneer to that effect. The sale then proceeded, and the vessel was knocked down to *Norris*, the plaintiff, for 300*l.*; the defendant, *Williams*, was also a bidder. *William Wright*, at that time, owed the plaintiff about 200*l.*: immediately after the sale, the creditors applied to the plaintiff for payment, and he promised that he would come over from *Liverpool* on the following *Thursday*, and bring the purchase-money for the auctioneer to pay the creditors with. He did not so return, nor did he prefer any claim to the vessel until *March*, 1832, when he came over, with his attorney, to demand possession of her from the defendant *Williams*, on whose premises she had remained ever since the sale, and who refused to let them have access to her till the materials were paid for. The auction duty and the auctioneer's charges were discharged by *Thomas Wright* a few days after the sale, but the purchase-money was not paid to the auctioneer, nor were the repairs ever paid for. A bill of sale from *William Wright* to the plaintiff was executed on the 1st *December*, 1828, and described the vessel as one "not

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yet having a name," but did not recite any certificate of registry; nor was there any proof given that the vessel had, in fact, been registered. There was no proof that *Norris* had paid the balance of the purchase-money to any person. The learned Judge was of opinion that the agreement for payment of the repairs out of the purchase-money, of which the plaintiff was cognizant, precluded him from maintaining this action till such payment was made, and accordingly directed a nonsuit, with leave to the plaintiff to move to enter a verdict for 300*l.*; and the defendant was also to be at liberty to contend that the sale was void, under the Registry Act, 6 *Geo.* 4, c. 110, s. 31.

In the following term, *J. Jervis* accordingly obtained a rule *nisi* to enter a verdict for the plaintiff; against which,

Lloyd shewed cause.—The nonsuit was right. The repairs being done by other persons in the defendant's yard, he and others supplying materials for that purpose, gave him no lien at law, but it might by the agreement of the parties. *Thomas Wright* was the agent of *William Wright*, and he agreed that the ship should not be taken away till the materials were paid for; therefore, the title passes to the vendee with this limitation, if it was known to him. It is true that it was not communicated to him before the sale, but it was while the contract was in *feri*, and he consents to pay the charges. [Lord *Lyndhurst*, C. B.—It was knocked down to *Norris*; he was therefore entitled to have a conveyance executed.] It was merely an executory agreement; he could have withdrawn from it on the terms being made known to him. The auctioneer was not bound to mention it at the sale, as it did not vary the terms of the sale, but only the application of the money. Before possession was taken, or the money paid, these

s were engrafted on it, and *Norris* assents to the agreement, and says that he will pay the different claim-

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William Wright was not damnified by this, and it was a good consideration for it; because the plaintiffs get not merely the hull, but a repaired vessel, in which improvements had been made. *William Wright* is not bound to deliver the vessel till payment of the charges; and he can say that payment shall be made to *Williams*, and till that is done *Norris* has no right to possession. *Thomas Wright*, as agent of *William Wright*, had agreed that it should remain in *Williams's*

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till the charges were paid, so that *Wright* had no power to deliver possession of it; a sale then takes place. *Wright* might have insisted on the payment being contemporaneous with the delivery of the ship; but, instead of doing that, the plaintiff, who was the purchaser, agrees to pay the creditors, and therefore the defendants, the creditors, represent the unpaid vendor; and, if the unpaid vendor had a right to object to the removal of the vessel till the price is paid, so have the parties who represent him. This gives the parties a lien on the vessel, and the creditors succeed to the rights the vendor had; as he could have detained the vessel till payment, if he had. *Norris* must pay somebody, and he has agreed to pay the creditors. Besides, they have a lien on the furnishing materials; for they have not parted with the possession, though there has been an appropriation. *Wright* employed the different parties, not *Williams*, and he stands to him in the relation of an unpaid vendor of the vessel. Again, the bill of sale did not recite the certificate of registry; in fact it was not registered, therefore the property has not been transferred to the plaintiff, so he cannot maintain trover. By the 6 Geo. 4, c. 110, s. 31, it is enacted, that "when and so often as the property in any ship or vessel, or any part thereof, belonging to any of his Majesty's subjects, shall after registry thereof be sold to

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any other or others of his Majesty's subjects, the same shall be transferred by bill of sale, or other instrument, in writing, containing a recital of the certificate of registry of such ship or vessel, or the principal contents thereof, otherwise such transfer shall not be valid or effectual for any purpose whatever, either in law or equity." [*Bayley, B.*—That clause affects only British-built vessels that have been registered; but there was no proof of this ship being a British vessel, or that she had ever been registered]. We have a right to assume her to be British, and of a British owner, as the contrary is not shewn. [*Bayley, B.*—*Williams* would not let a person go into the vessel to examine whether she was foreign built or not]. That was to prevent him from exercising any act of ownership, and does not lead to a suspicion that she was not British built. Either then the ship was not registered, and the statute was not complied with, or, if registered, it is not recited in the bill of sale, and in neither case can the property pass. [*Bayley, B.*—I do not know that we must presume it to be a British vessel].

J. Jervis, contra.—There cannot be a lien except by the usage of trade, by express contract, or by legal relation. To bind *Wright*, he must have expressly assented. Where the promise is made to a third person, the party is not bound by the promise. Here, *Jones* was not the agent of the creditors; and therefore, the promise to him was immaterial. In *Williams v. Everett (a)*, where bills had been remitted to the defendants, with directions to pay the amount to the plaintiff and other creditors, and the defendants refused to indorse the bills away, or to act upon the letter, admitting, however, that they had received directions so to apply the money, it was held, that, without an assent on their part to the purport of

(a) 14 East, 582.

the letter, the plaintiff could not maintain an action for money had and received to his use. Here the auctioneer was rather the agent of the vendor and vendee than of the creditors. [Lord *Lyndhurst*, C. B.—The auctioneer had been authorized by *Williams* to receive the money, and *Norris* assents to pay the money to him. If I have authority from *B.* to receive money from *B.*'s debtor, and the debtor promises me to pay it, is he not bound by his promise?] Here the promise is to pay a third party, namely, the creditors, and the assent is only inferred from the terms of the contract. It is true *Wright* had said that the vessel should not go out of the yard until the repairs were paid for; but *Norris* knows nothing of that; and, without an express agreement, the law will not engraft a lien on the contract. [Lord *Lyndhurst*, C. B.—Here *Norris* stipulated to pay a particular person, but he pays somebody else]. At all events, the bill of sale transferred the right to the possession of the vessel to the plaintiff.

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LORD LYNDHURST, C. B.—In this case certain repairs were done to a vessel, and certain materials found. *Williams* and an agent of *Wright* have the ship put up for sale. *Williams* then interposes, and the agent of *Wright* agrees with the agent of *Williams*, *Jones* the auctioneer being a party, that *Jones* should have the money and dole it out to the creditors. This was not binding on *Norris*, unless he knew it; but it was communicated to him, and he expressly assented. He, however, has not paid *Jones* agreeably to that arrangement, and has, therefore, no right to maintain trover for the vessel.

BAYLEY, B.—The nonsuit here was according to law and justice. *Robert Williams* had expended money in materials employed in the repairs of the ship. An auc-

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tioneer was employed to sell the vessel when improved by the work and materials. *Robert Williams* said that the vessel should not depart until the creditors were paid. *Wright* consented to this, and an agreement was signed that *Jones* the auctioneer should receive the money and pay it over. The ship was knocked down to *Norris*; he assents to the arrangement; he need not have done so, but he does; therefore, he undertook to pay *Robert Williams* and the other parties, and all who would be bound concur in assenting. But it is said he is entitled to the possession under the bill of sale. As he agreed to pay in a particular manner, he was not entitled to the possession until he so paid.

VAUGHAN, B.—I am of the same opinion. The property does not vest till the price is paid: here, the plaintiff agreed to pay according to a particular arrangement, but does not do so, therefore he is not entitled to the possession.

BOLLAND, B.—The question is, whether *Norris's* assent made him liable to pay *Jones* for the creditors? The sale would not have taken place but for this arrangement. *Norris* was afterwards told of it, and he adopts it.

Rule discharged.

WARD v. BELL.

Where there are several counts on the same cause of action, and only one cause of action is proved, the plaintiff is entitled to a verdict on one count only, and to have his costs taxed on that count only.

ASSUMPSIT upon an award.—The declaration contained seven counts, some of which had been added upon a summons taken out before the Judge at the Assizes.

At the trial, before *Alderson, J.*, at the last Assizes for the county of *York*, one submission and one award only

was proved. The plaintiff having recovered a verdict, the Master, in taxing costs, allowed costs of all the counts to the plaintiff.

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Wightman obtained a rule for the Master to review his taxation; against which cause was now shewn by

Pollock and *Starkie*, who contended that the counts had been properly introduced, some of them having been sanctioned by the learned Judge who allowed the amendment. [*Bayley*, B.—How could the plaintiff be entitled to a verdict upon more than one count, when he only proved one cause of action? Suppose that a defendant at the trial insists that the plaintiff, having only proved one cause of action, is only entitled to a verdict on one count, and the Judge were to direct a verdict on more than one count, might not the defendant tender a bill of exceptions (a)?]

LORD LYNTHURST, C. B.—How can it be said that all the counts were proved, when there was only evidence of one submission and one award? We have decided the same point, and acted upon the same principle, several times. The rule must be made absolute.

Rule absolute.

(a) The same remark was made by the learned Baron, in *Hall v. Ashurst*, *ante*, p. 714, where the same point arose, and the decision was the same as in the present case.

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THOMAS DARKER v. FRANCIS DARKER, JOHN LOMAS DARKER, (in the will called JOHN DARKER), ALICE DARKER, MARY ANN DARKER, and EMMY DARKER.

A testator devised as follows:

"I give all my personal leasehold mortgages, and freehold estates, goods, ready money, chattels, wheresoever and whatsoever, to my brother, *T. D.*, in trust for my nephew and nieces, *J. D.*, *A. D.*, *M. A. D.*, & *E. D.*, when the younger shall come of age; also, if my brother, *T. D.*, should have children, then his children to have equal share with my four before-mentioned nephew and nieces, he, my brother, *T. D.*, to pay for their education and maintain them, if any is wanted, he paying himself for any trouble he may be at; and he living at free cost in the house I now occupy, keeping *Sarah*, my servant, if they can agree, and if not, to give her one shilling per week for life."

THIS was a petition in the above suit, by the defendants, to the Lord Chief Baron on the equity side of the Court, and the Lord Chief Baron desired that it might be argued before the full Court.

The petition stated, that *William Darker* duly made and published his last will and testament in writing, which was executed as the law requires for the passing of real estates by devise, in the words following:—

"I give all my personal leasehold mortgages and freehold estates, goods, ready money, chattels, wheresoever and whatsoever, to my brother, *Thomas Darker*, in trust for my nephew and nieces, *John Darker*, *Alice Darker*, *Mary Ann Darker*, and *Emmy Darker*, when the younger shall come of age; also, if my brother, *Thomas Darker*, should have children, then his children to have equal shares with my four before-mentioned nephew and nieces, he, my brother, *Thomas Darker*, to pay for their education and maintain them, if any is wanted, he paying himself for any trouble he may be at; and, *he living at free cost in the house I now occupy, keeping Sarah, my servant*, if they can agree, and, if not, to give her one shilling per week for life."

It appeared that *Sarah*, the servant named in the will, died before the youngest child attained twenty-one; and that the defendants had all of them now attained the age of twenty-one years.

Held, that, under this devise, the nephew and nieces of the testator named in the will were entitled to the rents and profits of the estate when the youngest came of age; but in the event of any child or children being born to *T. D.*, such child or children, if more than one, would be entitled to share equally with the other nephew and nieces, in the future rents and profits, from the time of their respective births; and that to such child or children the provision as to education and maintenance would also apply, as well as to the nephew and nieces named in the will.

Held, also, that the testator did not intend that his brother, *T. D.*, should give up the house on the youngest niece attaining twenty-one.

The petition prayed, that the plaintiff, *Thomas Darker*, might be ordered to deliver up to Mr. *Samuel Rickards*, for the benefit of the petitioners, possession of the house and premises so given by the said testator to the said plaintiff, to live in during the minorities of the petitioners; and likewise, that the plaintiff should be ordered to deliver over to the said *Samuel Rickards* the title-deeds and writings relating to the said house and premises, and all other title-deeds and writings relating to the testator's estate.

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Jervis, and *Parker*, in support of the petition.—The true construction of this will is, that the children took a vested interest, at the time of the testator's death, in the property which was to be divisible when the youngest child became twenty-one. The trust was subject to two conditions: *first*, to pay for the education of the nephew and nieces of the testator; and, *secondly*, to keep his servant *Sarah*, if they could agree, if not, to give her one shilling a week for life. The trustee has not been called upon to perform either. The first part of the will gives "to the testator's brother, *Thomas Darker*, all the property the testator had, in trust for his nephew and nieces when the youngest should come of age." Though a class is mentioned, yet here the persons are named. [*Bayley*, B.—When there is a bequest to a class, it will vest in those who are *in esse* at the period; and, if any of the same class are born after, it will open and let them in]. The word "then" refers to "when," which went before, and means "at that time;" not "in that case." It is not said, "if *Thomas Darker* should have children at any time," but "then;" and if he had meant "at any time," the word "shall," not "should," would have been used. The desire to pay for the education and maintenance can only be referable to the period of mi-

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nority, during which time those duties are necessary to be performed. [Lord *Lyndhurst*, C. B.—The trust as to the servant would remain after the expiration of the minority]. A portion of the trust estate must be set aside for that object when the youngest child attained twenty-one. [*Bayley*, B.—If the trust ceases at the time the younger child attains twenty-one, the trustee would still be liable to keep the servant, or to pay 1*s.* per week himself after. Lord *Lyndhurst*, C. B.—When the trustee has something to do, the trust is kept alive for that purpose].

Wigram, for *T. Darker*, *contra*.—The intention of the testator may be ascertained, in doubtful parts, by looking to those parts of the will as to which there can be no doubt. Now, it is certain that the two families were the objects of the testator's will. The first family is named, and another that might come *in esse* referred to. The second object is the education of the family of *Thomas Darker*. If we stop at the words, "pay for the education and maintain them," this would mean to pay at all events; but the words, "if any is wanted," shew that it is meant, if *Thomas Darker* should not be able to maintain them himself. The words, "pay for the education and maintain them," would, in strictness, apply only to the children of *Thomas Darker*, but all that *Thomas Darker* is concerned in maintaining is, that they must at any rate be included. [Lord *Lyndhurst*, C. B.—If it applies to all, then the trust must be continued until it be decided whether *Thomas Darker* will have children or not]. As to the servant, the intention was, that she was to be provided for during her life. That puts the case beyond all doubt. It was said she died before the youngest child attained twenty-one, and therefore the condition did not attach. But the question is, not what the event was, but what

the testator contemplated. The testator contemplated imposing a burthen on the trustee, and wherever that is the case, the party on whom the burthen is cast has an estate co-extensive with the trust.

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Jervis, in reply.—The real question on this petition is, whether the petitioners are entitled to the rents and profits of the house? The testator contemplated the maintenance and education of his nephew and nieces, equally with the children of his trustee, *Thomas Darker*. [*Lord Lyndhurst*, C. B.—The words, “his children,” are properly the last, antecedent to the words, “their education and maintain them.”] They cannot apply to his own children, because he is bound to maintain them. [*Bailey*, B.—Suppose the words were expressly “to maintain his own children,” would he not have had a right to retain, whilst there was a possibility of his having any?] If it includes the children of both, he having none at the time, when the youngest of his nieces attain twenty-one, he ought to give it up, with the right to resume on his having children. [*Bailey*, B.—That would be unreasonable, for, if it were so, then he would come in when a child was born; and if it died he must go out again, and so he would be entitled to enter, and be liable to be divested, as any children might in future be born and die. If all the nephews and nieces had died before the youngest attained twenty-one, would the heir-at-law be entitled to enter? One purpose of the will is, to maintain in the house the children of his brother and his own]. It is submitted that the heir-at-law would have had a right to enter, subject to the right of *Thomas Darker* to re-enter on his having a child born. He is only bound to maintain the nephew and nieces until they are twenty-one, but not after. [*Vaughan*, B.—As *Sarah* might have survived the minority of the children, *Thomas Darker* must take a larger estate, in

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order to keep her]. There is no legal estate given to the trustee.

Cur. adv. vult.

The judgment of the Court was afterwards delivered by Lord LYNDEHURST, C. B.

Under this devise, the nephew and nieces of the testator who are named in the will were entitled to the possession of the rents and profits of the estate when *Emmy* came of age; but, in the event of any child being born to *Thomas Darker*, such child or children, if more than one, will be entitled to share equally with the other nephew and nieces in the future rents and profits from the time of their respective births. To such child or children the provision as to education and maintenance would also apply, as well as to the nephew and nieces named in the will. We think, therefore, that it was not the intention of the testator that his brother *Thomas Darker* should give up the house upon *Emmy's* attaining the age of twenty-one. This is further confirmed by the provision relating to the servant. It is obvious that the testator intended the service to be in the house in question; and he considered that it might endure for the life of *Sarah*, and he could not therefore look to the time when *Emmy* should come of age, as the period when the house was to be relinquished by his brother. The prayer of the petition must therefore be refused.

Petition refused.

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1833.

PRYER *v.* SMITH.

THE defendant was a prisoner, and the declaration had been delivered in *Easter* Term, and the plaintiff in this term signed judgment for want of a plea. No rule to plead as of this term had been given.

Busby moved to set aside the judgment as irregular, upon the ground, amongst others, that there should have been a rule to plead of the same term in which the judgment was signed.

The Court referred to *Mould v. Murphy* (a), and refused the rule upon this point.

(a) *Ante*, p. 395.

Declaration was delivered in *Easter* Term, and judgment was signed for want of a plea in *Trinity* Term, without giving a fresh rule to plead as of *Trinity* Term:—*Held*, that it was not necessary to give a new rule to plead as of that term.

JONES *v.* FITZADDAMS.

ON the last day of term, *Addison* moved to discharge the defendant out of custody, under the 48 *Geo. 3, c. 123*, he having been in custody twelve months for a debt under 20*l.* No notice of the application having been given, the Court refused to grant a rule absolute, and

Addison prayed for a rule to shew cause at chambers in the vacation; but the Court, on reference to the words of the act, “upon application for that purpose in term time made,” would not allow the rule to be drawn up at chambers, but granted the rule to be drawn up for the next term.

Rule accordingly.

application to be made to the Court in term time.

On motion to discharge a defendant, who had been more than twelve months in custody for a sum under 20*l.*, the Court will only grant a rule *nisi*, if no notice of motion has been given; and they will not, even on the last day of term, grant a rule to be drawn up for shewing cause at chambers in the vacation, the act 48 *Geo. 3, c. 123*, directing the ap-

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1833.

VALLANCE *v.* EVANS.

A defendant succeeded on a plea which went to the whole declaration, and the jury was discharged on the other issues which were joined:—*Held*, that the Master was right in not allowing to the defendant the costs applicable to the issues upon which the jury were discharged.

TRESPASS for knocking down and prostrating a board, &c. &c. Plea to the whole declaration, that the board was a nuisance to the King's public highway, and justification accordingly. The plaintiff, in his replication, took issue on the allegation of nuisance to the public highway, and now assigned excess, &c., to which new assignment the defendant suffered judgment by default.

There were several other pleas upon which issues were joined.

At the trial at the last *Derby Assizes*, the defendant succeeded in the above plea of justification, which covered the whole declaration; and the learned Judge who tried the cause discharged the jury upon the other issues. In taxing the costs, the Master disallowed all the costs applicable to the issues upon which the jury were discharged.

Hill moved, on the part of the defendant, that the Master might review his taxation; but the Court said, that the Master was right in not allowing to the defendant the costs of the issues which were not found either one way or the other; and that the defendant was not entitled either to the costs of the pleadings or of the witnesses as to those issues.

Rule refused.

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1833.

PENNELL v. THOMPSON.

THIS was an action for a libel brought against the defendant, who was the editor of a publication called the *Satirist*. The plaintiff had a verdict with 100*l.* damages, and issued a *fi. fa.* for 193*l.*, damages and costs.

In order to obtain an extent under 11 *Geo.* 4 & 1 *Will.* 4, c. 73, s. 3, against the principal and sureties in a recognizance entered into by the editor of a newspaper, the plaintiff must shew that he has used due diligence, and has not been able to procure satisfaction by writ of execution against the goods and chattels of the defendant.

Hutchinson obtained a rule *nisi* for an extent under the 11 *Geo.* 4 & 1 *Will.* 4, c. 73, s. 3, against the defendant and his sureties, on the recognizance given in pursuance of the 60 *Geo.* 3, c. 9. The affidavits in support of the motion stated, that the sheriff had returned *nulla bona* to the writ of *fi. fa.*, and that the defendant was not to be found. They also stated that no satisfaction could be obtained for the damages or costs, and it was sworn that neither of the sureties could be found. It was prayed that an extent might issue against the defendant and his sureties, and that service of the rule at the last place of abode, and at the newspaper office, might be good service.

Erle shewed cause.—The plaintiff ought to have made it appear to this Court, that, in the words of the statute, “he has not been able to procure satisfaction by writ of execution against the goods and chattels of the defendant.” He is bound, therefore, to shew the Court that he has used due diligence, and made proper exertions to obtain satisfaction from the goods of the principal. Nothing appears to have been done in this case, except suing out a writ of *fi. fa.*, and delivering it to, the sheriff.

Hutchinson, in support of the rule, submitted, that it appeared sufficiently on the affidavits that the plaintiff could not obtain satisfaction.

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1833.

PENNFELL
v.
THOMPSON.

LORD LYNTHURST, C. B.—You merely shew that you have issued a writ of *fieri facias*, and prove a return of *nulla bona*. The rest of your affidavit is quite general, and much too loose to satisfy the Court that you have used due diligence to procure satisfaction from the goods of the defendant.

Rule discharged.

MOLINEUX v. BROWNE.

Where a prisoner petitioned the Insolvent Court to be discharged, but did not file his schedule within fourteen days, or give notice to the creditors of the filing of the petition, pursuant to the 7 Geo. 4, c. 57, and the plaintiff did not declare against him before the end of the second term: —*Held*, that he was not entitled to be discharged out of custody.

IN this case the defendant was arrested on the 27th of September, on an *alias special capias*, at the suit of the plaintiff, returnable on the 2nd of November. On November 3rd, he surrendered in discharge of his bail in this action. On the 15th of December he filed his petition to be discharged under the Insolvent Act. No notice was given to the creditors of his intention to take the benefit of the Insolvent Act; but the plaintiff knew of it. The defendant did not file his schedule within fourteen days, pursuant to the 7 Geo. 4, c. 57, s. 40. No declaration having been delivered, *Mansel*, in this term, obtained a rule to shew cause why the defendant should not be discharged out of custody, on the ground that the plaintiff had not declared in due time.

Erle shewed cause.—By the act of the 7 Geo. 4, c. 57, s. 15, the filing of a petition renders the defendant not supersedeable as to any action for or concerning any debt, or sum of money, damages, or claim, with respect to which an adjudication can be made under the provisions of the act. It will be contended, that, inasmuch as the defendant did not file his schedule within fourteen days after the filing of his petition, the petition fell to the ground, and, therefore, that there could be no adjudication as to this action,

and, consequently, that the defendant became supersedeable by the plaintiff's not declaring in due time. But the 40th section of that act gives the Court a discretionary power as to the time in which a schedule may be filed; the words being, "That every such prisoner, who shall apply for relief under this act, shall within the space of fourteen days next after his petition shall have been filed, or *within such further time as the Court shall think reasonable*, deliver into the said Court a schedule," &c. This petition not having been dismissed it is still a valid petition, on which the Court may proceed to adjudication. But it will be also said, that, by the 42nd section, it is provided that notice shall be given to each of the creditors of the filing of the petition; but, though no formal notice was given, the plaintiff knew of it, and forbore to proceed in the action. The defendant was, therefore, not supersedeable.

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v.
BROWNE.

Mansel, in support of the rule.—The question is, whether the party, having filed his petition before the end of the second term, is prevented from taking advantage of the plaintiff's not having declared against him before the end of that term. The rule of Court, *Easter Term*, 3 *Geo.* 4, provides, that, "after notice given by prisoners of their intention to apply for their discharge under the Insolvent Act, no prisoner shall be supersedeable, or discharged out of custody at the suit of such plaintiff, from the time of such notice given." This rule, therefore, only applies where notice has been given to the plaintiff. The words of the act, section 40, are, "That every such prisoner, &c., shall within fourteen days, &c., or within such further time as the Court shall think reasonable, deliver a schedule." Unless, therefore, the Court makes a special order, the petition is at an end. Besides, the 42nd section provides, that notice shall be given to each of the creditors of the filing of the petition and schedule. Here, there

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was nothing but a petition filed; no notice was given, and no schedule was delivered pursuant to the act, and, therefore, the proceedings are thereby rendered inoperative, and no adjudication can now take place.

BAYLEY, B.—The 7 *Geo.* 4, c. 57, s. 15, provides, “That no prisoner, who shall have petitioned the Court for relief, shall, after the filing of his petition, be discharged out of custody as to any action for any debt, with respect to which an adjudication in the matter of such petition can, under the provisions of the act, be made, by reason of any *supersedeas*, for want of the plaintiff’s proceeding in such action.” The words of the act respecting the filing the petition and schedule are directory only as to the schedule being delivered within fourteen days, because it adds, “or within such further time as the Court shall think reasonable.” There is still a valid petition on the files, and the Court may proceed to adjudication. The rule of Court of *Easter* Term, 3 *Geo.* 4, was made before the present Insolvent Act passed. The filing the petition is evidence that he meant to take advantage of the act; and an adjudication might have been made of the plaintiff’s debt.

Rule discharged.

DOW v. CLARK.

An infant sued by *prochein amy*, and was nonsuited, and there was judgment against him for the costs. He sued out a writ of error, which was not proceeded with.

THE plaintiff, an infant, sued by *prochein amy*, and was nonsuited, and judgment entered against him for costs. He sued out a writ of error, of which notice was served on the defendant on the 29th of *January*, the day of its allowance, returnable on the 23rd of *April* last. The plaintiff had taken no steps since on the writ

After the return-day of the writ of error had expired, he was taken in execution on the original judgment:—*Held*, that he was not entitled to be discharged out of custody, and that it was not necessary that a *nonpros* should be signed to justify the execution.

error, but having been taken in execution on an *alias capias ad satisfaciendum* for the costs of the nonsuit, *Price* obtained a rule to set aside the *capias*, and to discharge the defendant out of custody.

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1833.

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v.
CLARK.

Butt shewed cause.—The *capias* was regularly issued, as the writ of error was not proceeded with. The infant plaintiff is liable to costs; and, if that is disputed, it can only be taken advantage of on a writ of error; *Gardiner v. Holt* (a); where the Court refused to interfere summarily, though the infant sued by *prochein amy*. *Finlay v. Fowle* (b).

Price, in support of the rule.—The infant is not liable to costs. The Court will not compel him to give security for costs (c). An infant taken in execution ought to be discharged, as he is not liable to pay the costs of a nonsuit. *Grave v. Grave* (d). [*Bayley, B.*—There an infant brought trespass by guardian. It is otherwise if the infant began by guardian, because there there is no malice inferred in him. *Turner v. Turner* (e), before Lord *King* in equity.] Then this is not matter of error, as the *prochein amy* is the party on the record. [*Bayley, B.*—So he was in *Gardiner v. Holt*; that case is exactly analogous.] If so, it is still a good writ of error. The defendant has not signed a *non pros*. [*Bayley, B.*—A *non pros* is not necessary to justify execution. The defendant may take out a *scire facias quare executionem non*, without that.] That is, after the record has been certified; and can only be sued out after a rule to certify the record has expired, unless the record has been certified. *Goodright v. Hugoson* (f). The defendant has the record and he should leave it with the officer of the Court, in order to enable us to make the

(a) 2 Strange, 1217.

(b) 13 East, 6.

(c) 2 Chitty's Rep. 359.

(d) Cro. Eliz. 33.

(e) 2 P. Wms. 296, 1 Stra.

708, S. C.

(f) Cas. tem. Hardw. 351.

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Dow
v.
CLARK.

transcript; he has not done so, and, therefore, could not rule us to transcribe. [*Bayley, B.*—You might have ruled the defendant to bring in the record. A Judge at chambers would have made an order to bring in the roll; but it was not necessary for them to rule you to transcribe the record, as the writ of error was spent.] We could not proceed upon it till we were able to get at the record.

BAYLEY, B.—It is beyond all question the plaintiff's duty to pursue the writ of error. The writ of error in this case was returnable on the 23rd of *April*; by that day he ought to have transcribed the record, and then he might have assigned his error.

Rule discharged.

REX (in aid of) *HOLLIS v. BINGHAM.*

A crown debtor, who has issued prerogative process against his own debtor, is not entitled to continue those proceedings after he has paid the debt he owed to the crown.

IN this case, *Follett* had obtained a rule calling upon *Hollis* to shew cause why the *scire facias* issued against the defendant should not be quashed, and why *Hollis* should not pay the costs occasioned thereby, and the costs of this rule.

Manning shewed cause.—The objection is, that *Hollis*, not being now indebted to the crown, cannot avail himself of the extent in aid issued against *Bingham*; but, if *Hollis* was indebted to the crown when the extent was issued, that is sufficient. The facts are, that *Hollis*, a distributor of stamps for the county of *Hants*, being liable to the crown for *Bingham's* deficiencies, an extent in aid issued against *Bingham* in the year 1817, and that, in the year 1822, *Bingham* took the benefit of the Insolvent Act. Unless, therefore, *Hollis* can avail himself of the extent in

aid, he will be without remedy. But it is objected that *Hollis* has since paid the amount he owed to the crown, and that the commissioners of stamps have cancelled the bond given by him; but the mere cancelling of the bond would not destroy the crown debt; a *quietus* was necessary. In *Rex v. Clarke* (a), the Court declared that it should not be a rule that a debtor of the crown, though the crown debt was satisfied, should not have the benefit of the crown process to reimburse himself, though it could not be granted under the circumstances of that case. The defendant prays not only for the costs in this rule, but for all the costs incurred since *Hollis* ceased to be a crown debtor, viz. in the year 1825; but he is in no way entitled to these costs. *Rex v. Bingham* (b).

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1833.

REX
v.
BINGHAM.

Follett, contrà.—Since the defendant has been discharged under the Insolvent Act in 1832, this case has been several times before this Court, and it has been decided that *Hollis* is not entitled to avail himself of prerogative process (c). The defendant was fully discharged as against *Hollis* by his discharge under the Insolvent Debtors' Act. Then *Hollis* can have no right now to proceed against the defendant by prerogative process, and to sue out this *scire facias*. The crown is no party to it, and *Hollis* is no longer a crown debtor.

BAYLEY, B.—It seems to me that this question was decided by the case in 2 *Crompton & Jervis*, 130. The Court there expressed an opinion that *Hollis* could have no further proceeding against the defendant, either in his own name or the name of the crown. *Bingham* being indebted to *Hollis*, who was a stamp distributor, an extent issued against *Hollis* in the year 1817, and an extent in aid of *Hollis* against *Bingham*. *Bingham* subsequently obtained his discharge under the Insolvent

(a) Banbury, 221.

(b) 1 Cr. & J. 379.

(c) 2 Cr. & J. 30.

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1833.

REX
v.
BINGHAM.

Debtors' Act. The consequence of that is, that *Hollis* has no right to sue for that debt, because it is at an end. Where circumstances occur which, as between the original creditor and debtor, would operate as a bar, and the crown, though it originally had an interest, has no longer any, are the Court to suffer the creditor to avail himself of crown process, so as to defeat what would have been a complete answer as between themselves? But *Hollis*, having once obtained prerogative process, contends that the crown is not barred, and, standing *in loco coronæ*, he is entitled to use that process. If *Hollis* is indebted to the crown, the crown has a right to compel payment from *Bingham*; but we must be satisfied that he is indebted to the crown before we allow him to avail himself of prerogative process. I think it would be an improper exercise of the discretion of this Court, if we held that he could avail himself of the process of this Court for a debt not due to the crown, but which has been discharged by the Insolvent Act. The mere circumstance of *Hollis's* being indebted when the process was originally sued out is not sufficient. If a crown debtor ceases to be liable to the crown, he ceases to be entitled to an extent in aid. That appears from this very case in *2 Crompton & Jervis*, 130. *Hollis*, therefore, acted at his peril, and the *scire facias* must be quashed, and the costs of it paid by him. As to the other costs we ought not to make any order.

BOLLAND, B.—The passage cited from *Banbury* is contained in a note at the end of the case, and it is upon the request of the Attorney-General that the Court makes that declaration.

The rest of the Court concurred.

Rule absolute.

Vide *Attorney General v. Stonehouse*, Hardres, 229, 230.

REGULÆ GENERALES.

IT IS DECLARED AND ORDERED, That in all cases in which a defendant shall have been or shall be detained in prison on any writ of *capias* or detainer, under the statute 2 Will. 4, c. 39, or being arrested thereon shall go to prison for want of bail, and in all cases in which he shall have been or shall be rendered to prison before declaration on any such process, the plaintiff in such process shall declare against such defendant before the end of the next term after such arrest, or detainer, or render, and notice thereof, otherwise such defendant shall be entitled to be discharged from such arrest or detainer upon entering an appearance according to the form set forth in the aforesaid statute 2 Will. 4, c. 39, sched. No. 2; unless further time to declare shall have been given to such plaintiff by rule of Court or order of a Judge.

T. DENMAN.	J. PARKE.
N. C. TINDAL.	W. BOLLAND.
LYNDHURST.	J. B. BOSANQUET.
J. BAYLEY.	W. E. TAUNTON.
J. A. PARK.	E. H. ALDERSON.
J. LITTLEDALE.	J. PATTESON.
S. GASELEE.	J. GURNEY.
J. VAUGHAN.	

IT IS ORDERED, That, from the present day, in all actions against prisoners in the custody of the Marshal of the Marshalsea, or of the Warden of the Fleet, or of the Sheriff, the defendant shall plead to the declaration at the same time, in the same manner, and under the same

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REG. GEN.

rules as in actions against defendants who are not in custody.

T. DENMAN.	J. PARKE.
N. C. TINDAL.	W. BOLLAND.
LYNDHURST.	J. B. BOSANQUET.
J. BAYLEY.	W. E. TAUNTON.
J. A. PARK.	E. H. ALDERSON.
J. LITLEDALE.	J. PATTESON.
S. GASELEE.	J. GURNEY.
J. VAUGHAN.	

IT IS ORDERED, That from and after the 10th day of *July* next, where the plaintiff proceeds by action of debt on the recognizance of bail in any of the Courts at *Westminster*, the bail shall be at liberty to render their principal at any time within the space of fourteen days next after the service of the process upon them, but not at any later period; and that upon such render being duly made, and notice thereof given, the proceedings shall be stayed upon payment of the costs of the writ and service thereof only.

T. DENMAN.	J. PARKE.
N. C. TINDAL.	W. BOLLAND.
LYNDHURST.	J. B. BOSANQUET.
J. BAYLEY.	W. E. TAUNTON.
J. A. PARK.	E. H. ALDERSON.
J. LITLEDALE.	J. PATTESON.
S. GASELEE.	J. GURNEY.
J. VAUGHAN.	

AN

I N D E X

TO THE

PRINCIPAL MATTERS.

ABATEMENT.

See PLEADING.

ACKNOWLEDGMENT.

See LIMITATIONS, STATUTE OF.

ACTION.

See LIMITATIONS, STATUTE OF.

I. *Commencement of.*

1. Since the Uniformity of Process Act, suing out the writ of summons is the commencement of the action for all purposes. *Alston v. Underhill*,
492

2. Since the passing of the Uniformity of Process Act, the writ of summons is to be considered as the commencement of the action; and the declaration must correspond with the form of action specified in the writ; and if the declaration is in a different form of action, it is irregular, and the Court will set it aside, leaving the plaintiff to declare on the writ, if he can do so according to his cause of action. *Thompson v. Dicus*,
768

II. *Notice of.*

By a local act for paving, lighting,

ACTION.

watching, and improving the town of *Leamington*, certain commissioners were appointed; and, by section 11, were authorized to appoint, by writing, a treasurer and clerk, and also all such surveyors, scavengers, rakers, &c. &c., beadle, constables, watchmen and other officers, deputies or assistants, for the execution of the purposes of the act, as they should from time to time think proper. By section 77, the commissioners were also empowered to appoint such number of able-bodied men as they should think proper, to be employed as watchmen during the night-time, and it was enacted, that it should be lawful for such watchmen, and they were thereby required in their respective stations, to apprehend and secure all malefactors, &c. &c., and all suspected persons who should be found wandering or misbehaving themselves during the hours of keeping watch. By section 78, the watchmen were to be sworn in as constables, and were to be invested with the like powers and authorities, &c. &c., as any constables were invested with or enjoyed by law. By section 163, it was enacted, that no action, suit, or informa-

tion, should be commenced against *any person or persons for any thing done or to be done under or by virtue of that act*, until one calendar month's notice thereof should have been first given in writing to the clerk of the commissioners of the cause of action, nor at any time whatsoever after sufficient satisfaction or tender should have been made to the party aggrieved. The act contained the usual power of pleading the general issue, and giving the special matter in evidence, and the act was to be deemed a public act:—*Held, first*, that the section requiring notice to be given is not confined to acts done, or directed to be done, by the commissioners, but applies to acts done by constables and watchmen. *Secondly*, that evidence of the defendants acting as constables and watchmen under the commissioners in the town, was *prima facie* sufficient to entitle them to the protection of the above section, without proof of their appointment; and, *thirdly*, that where the watchmen had reasonable ground of suspicion that felony had been committed by the plaintiff, and went to the plaintiff's house to apprehend him for such felony, but beat him, and used much more violence than was necessary for effecting his apprehension, they were protected by the section requiring notice. *Butler v. Ford and Ledger*, 662

ADMINISTRATION BOND.

See EXECUTORS AND ADMINISTRATORS.

AFFIDAVIT.

See DISTINGAS, 1, 2.
OUTLAWRY.

I. To hold to Bail.

1. Where an affidavit to hold to bail for several causes of action is defec-

tive as to some of them, it will be bad *in toto*, so as to entitle the defendant to be discharged out of custody on filing common bail. *Baker v. Wills*, 238

2. In an affidavit to hold to bail on a promissory note or bill of exchange, the amount for which the instrument is drawn must be specified. *Brooke and Another v. Coleman*, 621

II. Defects in.

It is not sufficient, in an affidavit by the defendant in a cause, to describe him as the "above-named defendant," without any other addition. *Lawson v. Case*, 481

III. Filing.

The affidavits to shew cause against a rule on the revenue side of the Court of Exchequer must be filed, and the party who shews cause must take office copies of the affidavits, or have the originals in Court. *In re Jeffery*, 71

AGREEMENT.

Construction of.

1. In an agreement of reference it was agreed that the arbitrator "shall or may" award a certain matter, with a proviso, &c. &c.:—*Held*, that the words "shall or may" were imperative on the arbitrator, and that he was bound to insert the proviso in his award, the context of the agreement and the situation of the parties requiring such a construction. *Crump v. Adney*, 355

2. *A.* agreed to advance *B.* a sum of 4000*l.* on mortgage of certain freehold and copyhold premises; and by the agreement it was stipulated, that, within one week from the date of the agreement, *B.* should deliver to *A.* or his solicitor a complete abstract of the title to the premises, and produce

the title-deeds necessary to verify the same, and deduce and shew a good marketable title, within one month after the delivery of the abstract: and it was provided that if *B.* should not, within a week, deliver such abstract, and produce the title-deeds, and, within a month after the delivery of the abstract, deduce a marketable title, then it was to be at *A.*'s option to consider the agreement void: and, it was further provided, that *B.* should forthwith pay to *A.* all costs and charges incurred by him in investigating the title to the premises, &c. Abstracts of title were delivered soon after the agreement, but they were found defective. From the 24th of September, 1831, the day when the title ought to have been completed, until the 14th of May, 1832, negotiations were going on, *A.* remonstrating on the badness of the title, and informing *B.* that his money had, during the whole interval, been lying idle, and *B.*, during this interval, endeavouring to amend his title until the last-mentioned day, when he failed to do so, and the negotiation ended. In an action brought by *A.* to recover the amount of costs and charges incurred by him in investigating the title, and also interest on the 4000*l.* which had been lying idle from the 24th of September until the 14th of May:—*Held*, that *A.* was not entitled to recover the interest. *Sweetland v. Smith*, 585

3. *A.* contracted, in consideration of 220*l.* 10*s.*, to sell and plant a quantity of trees on *B.*'s land; and also that "he should and would, at his own costs and charges, well and sufficiently keep in order the trees aforesaid for two years after the planting, and that such as should die during that period, (except from injury by sheep, game or cattle), should be replaced by him." In an action to recover the price, the jury thought that the

words "keep in order" meant to prune only, and did not extend to weeding and clearing the ground, and they found their verdict accordingly. The Court, thinking this an improper construction, granted a new trial. *Allen v. Cameron*, 832

Held, also, that evidence of non-performance by *A.* of any part of the contract on his part was admissible in reduction of damages. *Ibid.*

AMBASSADOR.

See PRIVILEGE.

AMENDMENT.

Where allowable.

1. In an action by the assignees of a bankrupt, the Court allowed the declaration to be amended by adding the name of the official assignee as a plaintiff on payment of costs. *Baker v. Neaver*, 112

2. Where, in a declaration on a bill of exchange, it was stated, that the bill was drawn by *S. S.*, payable to his order, and the bill when produced in evidence was payable to the order of *T. E.*:—*Held*, that the Judge has rightly exercised his discretion, in allowing the record to be amended under 9 Geo. 4, c. 15. *Parks v. Edge*, 429

3. Where no matter in print or writing is produced in evidence, a Judge at *Nisi Prius* had no power, under 9 Geo. 4, c. 15, to amend the record from the oral testimony of witnesses called to speak to the contents of a written document which has been destroyed, and which contents, on their evidence, appear to be materially different from the statement of the document upon the record. *Brooks v. Blanshard*, 770

4. *Quære*—If a copy had been produced, in such case, as secondary evi-

dence, whether the Judge could have amended from such copy? *Ibid.*

5. Where a plaintiff, by mistake, had proceeded against the inhabitants of the *hundred* instead of the *borough* of *S.*, in an action for damage by rioters under the 7 & 8 *Geo.* 4, c. 31, the Court amended the writ and subsequent proceedings, by striking out the word "hundred" and substituting the word "borough," the time for bringing a fresh action having expired. *Horton v. The Inhabitants of Stamford*, 773

APPOINTMENT.

See OFFICE.

APPROPRIATION.

See PAYMENTS.

ARREST.

See SHERIFF.

I. Coverture.

Where a married woman has been arrested, the Court will discharge her on filing common bail, or order the bail-bond to be given up to be cancelled, if the coverture be clearly established, unless she has used deceit before or at the time of obtaining the credit. *Freame v. Mitford*, 54

II. Privilege from.

A practising barrister is privileged from arrest, *eundo, morando, et redeundo*, and he does not lose that privilege by going into a shop on his return from the Court, unless he remains there an unreasonable time. *Luntley v. —*, 579

III. Second Arrest.

A prisoner on *mesne* process discharged on a condition afterwards broken may be arrested a second time

without a Judge's order. *Cantellon v. Freeman*, 536

ASSETS.

See EXECUTORS AND ADMINISTRATORS.

ASSIGNEE.

See COVENANT.

ASSUMPSIT.

A pauper whose settlement was in the parish of *A.* resided in the parish of *B.*, and whilst there received relief from the parish of *A.*, which relief was afterwards discontinued, the overseers objecting to pay any more unless the pauper removed into his own parish. The pauper was subsequently taken ill and attended by an apothecary, who, after attending him nine weeks, sent a letter to the overseers of *A.*, upon the receipt of which they directed the allowance to be renewed, and it was continued to the time of the pauper's decease:—*Held*, that the overseers of *A.* were liable to pay so much of the apothecary's bill as was incurred after the letter was received. *Paynter v. Williams*, 810

ATTACHMENT.

See AWARD, 3.

Where, at the time of the service of a *subpœna ad testificandum*, the original *subpœna* was not shewn to the witness:—*Held*, that an attachment would not lie for disobedience to such *subpœna*, although the party serving it was not asked to produce it. *Wadsworth v. Marshall*, 87

ATTORNEY.

See PRACTICE.

UNDERTAKING.

I. Certificate.

An attorney neglected to take out

AWARD.

his certificate in the years 1815 and 1816. In 1832, he practised at the Quarter Sessions:—*Held*, liable for the penalties under 22 Geo. 2, c. 46, s. 12. *Slack q. t. v. Wilkins*, 23

II. Delivery of Bill.

A signed bill need not be delivered by an attorney suing for business done in the *Middlesex* Court of Requests. *Becke v. Wells*, 75

III. Rights of.

An attorney of another Court, who conducts an action in the *Exchequer* in his own name, can bring no action for his fees, and has no lien for such fees; and the Court will allow one judgment to be set off against another, without regard to his claim of a lien for such fees. *Latham v. Hyde*, *Hyde v. Latham*, 128

AWARD.

1. An award by an umpire is not vitiated by a mistake in the recital of the award, in the Christian name of one of the original arbitrators who had appointed the umpire. *Trew v. Burton*, 533

2. Such mistake not being material, an alteration made by a stranger subsequently to the publication of the award, by striking out the wrong and inserting the right Christian name, does not vitiate the award, but leaves it in the state in which it was before such alteration. *Ibid.*

3. Where the affidavit for an attachment for not performing an award was defective, in not shewing that the award was published before the authority of the umpire expired:—*Held*, that it was sufficient if it appeared from the *jurat* that the affidavit of execution by the umpire was sworn before that time expired. *Ibid.*

BAIL

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BAIL.

See AFFIDAVIT.
PRACTICE.

I. Giving time to the Principal.

After a bail-bond has been forfeited, and an assignment thereof taken, time given to the principal is no discharge of the sureties. *Woosnam v. Price*, 352

II. Justification of Bail.

An affidavit of justification of bail must state that the parties are worth the requisite property. *Rogers v. Jones*, 323

III. Notice of.

1. A notice, that the bail has resided “*within*” the last six month at the place mentioned therein, is sufficient, when accompanied by an affidavit stating that the bail has resided there “*for*” the last six months, agreeably to the form prescribed by Rule 3 of T. T. 1 Will. 4. *Ward's Bail*, 28

2. One of the bail, carrying on the business of a *Scotch* ale agent, was described in the notice of bail as a “gentleman:”—*Held*, a substantial misdescription. *Flemming's Bail*, 111

3. Where the defendant is a prisoner, a notice of putting in and justifying bail at the same time must state that the defendant is a prisoner. *Creighton's Bail*, 335

4. An informality in the notice of bail does not render the proceeding null, so as to justify the plaintiff in issuing an attachment against the sheriff. *Rex v. Sheriff of Middlesex*, 482

IV. Render of Principal.

The Court will enlarge the time for bail to render a defendant who is under imprisonment in a country gaol upon conviction for libel, until a week after the imprisonment under the sentence has expired; not until a

week after the term for which he was sentenced to be imprisoned. *Campbell v. Ackland*, 73

V. Time for putting in.

Where the defendant was arrested on the 1st of *April*, and, owing to *Easter Monday* and *Tuesday* falling on the 8th and 9th, had the 10th to put in bail, and the plaintiff on the 10th, took an assignment of the bail-bond and issued a writ of summons against the bail, the Court set aside the proceedings. *Alston v. Underhill*, 492

BANKER.

Certain stock was vested in trustees, upon trust, amongst other things, to pay the dividends to *A.* during his life; and, after his death, upon trusts for his widow and children. *M. & Co.* were the bankers of the trustees, and employed by them to receive the dividends. During the life of *A.*, the amount of the dividends on the stock was regularly carried to the account of *A.*, in the books of the firm, and drawn for and received by him. *A.* died on the 23rd *January*, 1824; and, on his death, a new account was opened with the trustees in the books of *M. & Co.*; and, in that account, credit was given to the trustees for dividends, amounting to 1403*l.*, as received in *April* and *July*, 1824, and the trustees were debited with several sums, amounting to 225*l.*, paid to checks drawn upon the house, on the presumption that the dividends had been actually received. In point of fact the above dividends had not been received by *M. & Co.*; *F.*, a partner in that house, having, in the lifetime of *A.*, sold and transferred the stock in question by means of forged powers of attorney. *F.* continued, after this transfer, to enter in the day book of *M. & Co.* the amounts of the half-yearly dividends,

BILLS AND NOTES.

on the days when they would have become due, as if he had duly received the same at the Bank of *England*, which amounts were, in the ordinary course of business, regularly posted from such day-book to the credit of the trustees by the clerks of *M. & Co.* Commissions of bankrupt issued against the members of the firm of *M. & Co.*, in *September* and *October* 1824:—*Held*, that, at the date of those commissions, the bankrupts were not indebted to the trustees for the balance of the dividends appearing by the books to have been received. *Hume v. Bolland*, 130

BANKRUPT.

See SHERIFF.

One of two partners, after committing an act of bankruptcy, handed over a bank post-bill and some silver to the agent of the drawer of a bill of exchange, accepted by the partners, and which was just about to become due, for the purpose of protecting such bill. Such handing over was found to be a fraudulent preference, and to have been in contemplation of bankruptcy. On the same day, but a few hours later than the time of handing over the note and money, the other partner committed an act of bankruptcy:—*Held*, that the act of the partner who had committed the act of bankruptcy before he handed over the property was not binding, and that the assignees of the two partners might recover the value of the property. *Burt v. Moult*, 525

BARRISTER.

See PRIVILEGE FROM ARREST.

BILLS AND NOTES.

See PLEADING.

I. Action on.

1. Defendant and his surety signed

a promissory note. Defendant was afterwards discharged under the Insolvent Act. The payee applied to the surety for payment, whereupon the defendant, to prevent the surety being sued, joined him in a new note:—*Held*, in an action by the payee, that he could not recover on this note against the defendant, as it was a new contract for the old debt, though the new consideration of forbearance to the surety was added. *Evans v. Williams*, 30

2. A promissory note for 100*l.*, on the face of it payable on demand, was given to the trustee of a Building Society, to secure certain instalments, fines, and interest. The payee having sued upon the note, took a cognovit for the instalments then due, and costs, which were afterwards paid; and he gave a receipt as for debt and costs in the action:—*Held*, that he could not maintain another action on the note for instalments which subsequently became due. *Siddall v. John Rawcliffe*, 487

3. A bill of exchange for 300*l.* being sent to *A.* to get it discounted, a banking company advanced 100*l.* on the bill upon *A.* giving the company his guarantee for the amount so advanced. *A.* had no other interest in the bill:—*Held*, in an action brought by *A.* on the bill, that he was entitled to recover the whole amount, and not merely the amount for which he gave his guarantee. *Reid v. Furnival*, 538

II. Notice of Dishonour.

1. *S. & Co.*, the owners of a ship of which *H.* was captain, despatched the latter to *Miramichi*, with instructions to purchase a cargo of timber, and draw upon them for the amount. *H.* proceeded to *Miramichi* accordingly, and there purchased some timber

from one *L.*, for 154*l.* 11*s.* 11*d.*, and drew a bill upon *S. & Co.* for the amount, at sixty days' sight, in favour of the seller or his order. The bill was dated 4th September, 1826; and, on the 21st November, it was duly presented for acceptance and protested for non-acceptance. The plaintiff was in *Liverpool*, with the ship under his command, from October, 1826, until April, 1827. It was not proved that the plaintiff received any notice of the dishonour of the bill, either from the then holder or from the defendants, who had got the cargo. In 1832, the plaintiff was arrested upon this bill, at *Miramichi*, and paid it, in order to release himself from the arrest. In a special action of *assumpsit*, brought by the plaintiff against the defendants for not paying the bill, for not accepting it, and for not indemnifying the plaintiff from all loss &c. sustained by him from having drawn the bill:—*Held*, first, that, under these circumstances, the defendants could not insist on the want of proof of notice to the plaintiff of the dishonour of the bill, as a defence to the action; secondly, That a promise to indemnify was the promise which the law would, in this case, imply; and as there was no damnification till 1832, the statute of limitations did not apply. *Huntley v. Sanderson*, 467

2. The day after a bill of exchange had been dishonoured in *London*, and before the fact of the dishonour could be known in *Yorkshire*, the drawer's clerk called in *Yorkshire* upon the indorser prior to the holder. A conversation took place as to the bill being likely to come back, and the clerk said, "*I suppose there will be no alternative but my taking up the bill, and if you will bring it to Sheffield on Tuesday, I will pay the money.*" The indorser did not receive either the bill

or notice until some days after the *Tuesday*, and notice of dishonour was not given to the drawer in due time :—*Held*, that the promise did not dispense with giving due notice of the dishonour to the drawer. *Pickin v. Graham*, 725

III. Presentment of.

On *Wednesday*, the 23rd of *November*, *A.* bought goods from *B.*, which he paid for in country bank-notes. On *Monday*, the 28th, *B.* requested *A.*'s servant, as a favour, to exchange the notes for money, which he accordingly did. On the same day the bank stopped payment; *A.* heard of it on *Tuesday*, and on *Wednesday* wrote to *B.*, informing him of the failure of the bank, and desiring him to exchange the notes; but the notes were not produced or tendered to *B.* until long afterwards, nor were they ever presented at the bank. In an action brought by *A.* against *B.*, to recover the value of the notes, held that *A.* was not entitled to recover. *Rogers v. Langford*, 637

BOND.

See STAMP.

Presumption of Payment of.

Where, in debt on a bond more than twenty years old, to rebut the presumption of payment, the obligee gave evidence of payments of interest by the obligor to *A. B.*, equal in amount to the interest that would become due on the bond :—*Held*, that an indorsement on the bond in the handwriting of the obligee, and which appeared to have been made at or about the time when the bond was executed, but which was not proved to have been ever seen by the obligor, stating that the bond was given to the obligee in trust for *A. B.*, was admissible in evidence to connect the pay-

COSTS.

ments of interest with the bond. *Gleadow v. Atkin*, 410

CAPIAS.

See PRACTICE.

1. The mistake of *Lawrance* instead of *Lawrence* in the name of the defendant in a writ of *capias*, is immaterial. It is sufficient in a writ of *capias* to describe the defendant as of *Kent Street*, in the county of *Surrey*. *Webb v. Lawrence*, 806

2. A writ of *capias* was indorsed "Bail for 40*l.* and upwards, by affidavit :"—*Held* sufficient. *Ibid.*

3. There need not be a date to the indorsement on the writ of *capias*. *Ibid.*

CASE.

In case for running down a ship, neither party can recover when both are in the wrong; but the plaintiff may recover, although he might have prevented the collision, provided that he was in no degree in fault in not endeavouring to prevent it. *Vennall v. Garner*, 21

COSTS.

See PRACTICE.

I. Of Counts not proved.

1. Where there are several counts on the same cause of action, and only one cause of action is proved, the plaintiff is entitled to a verdict on one count only, and to have his costs taxed on that count only. *Ward v. Bell*, 848

2. A defendant succeeded on a plea which went to the whole declaration, and the jury was discharged on the other issues which were joined :—*Held*, that the Master was right in not allowing to the defendant the costs applicable to the issues upon which

COSTS.

the jury were discharged. *Vallance v. Evans*, 856

II. Of good Jury.

Since the Rule 101, H. T. 2 *Will.* 4, the costs of a good jury upon the execution of a writ of inquiry are allowed on taxation. *Wilkinson v. Malin*, 237

III. Of Trial.

Where, during the trial of a cause, one of the jury absconded, and the other jurors were accordingly discharged; and a second trial was afterwards had, when a verdict was found for the plaintiff:—*Held*, that the plaintiff was entitled to the costs of the first trial. *Harrison v. Bennett*. 203

IV. Security for.

Where the assignees of a bankrupt proceed with an action brought by the bankrupt, they must give security for all the costs. An application for security for costs in such a case, *held* not too late, although not made until the end of *Easter Term*, the *fiat* having issued in *November*, and the plaintiff having, before *Easter Term*, given notice of trial for the sittings after that term. *Mason v. Polhill*. 620

V. Taxation of.

Some of many defendants demurred to some counts of a declaration, and pleaded not guilty to the remainder; and the rest of the defendants pleaded not guilty to the whole:—*Held*, that the defendants who demurred could not, after obtaining judgment in their favour on the demurrer, tax their costs on that judgment. *Forbes v. Gregory*, 435

VI Costs under 43 Geo. 3.

1. The purchaser of a horse can re-

COURT OF REQUESTS. 875

cover for breach of warranty, in an action for damages only, and cannot sue on the *indebitatus* counts, as on a failure of the original consideration, unless there was a stipulation in the original agreement for rescinding the contract in such event, or unless both parties subsequently agree to rescind, or unless the case be one of fraud; and, therefore, there is no reasonable or probable cause within 43 *Geo.* 3, c. 46, for holding to bail in a case not within those exceptions. *Gompertz v. Denton*, 207

2. A vendor arresting the vendee for the full amount of goods sold and delivered, is not liable to pay costs under the 43 *Geo.* 3, c. 46, s. 3, although part of the goods sent on approval had been returned to the vendor, and accepted by his servant, it not appearing that the vendor had personal notice of such return and acceptance. *Roper v. Sheasby*, 496

3. A defendant, who is arrested for a larger sum than is recovered against him, is entitled to costs under stat. 43 *Geo.* 3, c. 46, s. 3, if there be no reasonable or probable cause for the arrest, though the arrest is not shewn to have been malicious. *Erle v. Wynne*, 532

COURT OF REQUESTS.

See ATTORNEY.

PRACTICE.

1. *Semble*, that the amount found by the verdict of the jury, and not the sum which the plaintiff claims to be due, is to be considered the debt for which the action is brought, and by which the Court are to decide whether the plaintiff ought to have sued in the Court of Requests. *Baddley v. Oliver*, 219

2. Where the master of a vessel, trading between *London* and *Rotterdam*, was, in the course of his trade, in the habit of coming with his vessel

to a particular wharf, and there unloading his cargo, which was deposited in a warehouse there, and a fresh cargo taken in; and who purchased necessities for the vessel in London, but had no residence, or counting-house, or warehouse, in London, in his own occupation:—*Held*, that he was not entitled to be sued in the London Court of Requests. *Double v. Gibbs*, 246

3. *Semble*, that an action for use and occupation is not within the exception in the 39 & 40 Geo. 3, c. 104, s. 11. *Ibid.*

COVENANT.

See LANDLORD AND TENANT.

Where maintainable.

An assignee who takes from a lessee leasehold premises by indenture indorsed on the lease, *subject to the payment of the rent and the performance of the covenants and agreements reserved and contained in the lease*, is not liable in covenant to the lessee for rent which the lessee has been called on by the lessor to pay after the assignee has assigned over. *Wolveridge v. Steward*, 644

DAMAGES.

See DISTRESS.

DEBT.

Semble, that debt cannot be supported for an escape under an attachment for non-payment of costs under a decree in equity. *Blower v. Hollis*, 93

DEVISE.

See WILL.

I. Construction of.

1. A testator, after charging such part of his property as might be ne-

cessary and adequate for the payment of his just debts, gave to his brother R. C. all that dwelling-house, &c., with all lands appertaining to the same, lately in the possession of G. S. of W., or his mortgagee, the said property lying and being in the township of W.; and also gave to R. C. all the share, right, and property of the H. estate, situate in the county of Chester, as left by his late father:—*Held*, that R. C. took a life estate only in the premises in W. *Doe v. Clarke*, 39

2. A testator devised his real estates to A. for life, and, *after his decease*, devised all his estate, as well real as personal, and all accumulations thereof, "to such of his the said testator's relations of the name of Pearce, being a male," as A. should by deed or will give, devise, or bequeath, or nominate or appoint; and in default of such appointment, the testator devised the said estates and premises "to such of his the testator's relations of the name of Pearce, being a male, as A. should approve of or adopt," "if he should be living at the death of A., his heirs, executors, administrators, and assigns, for ever." And in case A. should not have adopted any such male relation, or in case he should have made such adoption and there should not be any such male relation living at the time of the decease of A., then the testator devised the said estates and premises "unto the next and nearest of kin of him the said testator, of the name of Pearce, being a male, or the elder of such male relations, in case there should be more than one of equal degree living at his the said testator's decease, his heirs, executors, administrators, or assigns, for ever." The testator then gave all his plate, books, pictures, household goods, &c., to his executors, "in trust to permit and suffer A. to have, use, and enjoy the same during his life, and, after his decease, then in

trust for the persons who should succeed to or inherit his the said testator's real estates under and by virtue of that his will." *A.*, the tenant for life, died without issue, without having executed the power of adoption of a relation of the testator's, according to the will. The next or nearest relation, or nearest of kin, of the testator, living at his decease, were—first, *A.*, the tenant for life—secondly, *B.*, the plaintiff—and, thirdly, *C.*, the plaintiff's brother. The testator had a brother, of the name of *Zachary*, who, if living, or his son, if he had died leaving issue male, would have been the testator's next and nearest relation, and nearest of kin, of the name of *Pearce*; but it appeared that he had gone to sea, and had not been heard of for many years:—*Held*, that, under these circumstances, if *Zachary*, the testator's brother, died without issue, in the lifetime of the testator, *A.* took under the ultimate limitation, contained in the testator's will, an estate in fee simple in the testator's real estates, and an absolute interest in his personalty. *Pearce v. Vincent*, 598

3. A testator devised as follows: "I give all my personal leasehold mortgages, and freehold estates, goods, ready money, chattels, where-soever and whatsoever, to my brother, *T. D.*, in trust for my nephew and nieces, *J. D.*, *A. D.*, *M. A. D.*, and *E. D.*, when the younger shall come of age; also, if my brother, *T. D.*, should have children, then his children to have equal share with my four before-mentioned nephew and nieces, he, my brother, *T. D.*, to pay for their education and maintain them, if any is wanted, he paying himself for any trouble he may be at; and he living at free cost in the house I now occupy, keeping *Sarah*, my servant, if they can agree, and if not, to give her one shilling per week for life:"—

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Held, that, under this devise, the nephew and nieces of the testator named in the will were entitled to the rents and profits of the estate when the youngest came of age; but in the event of any child or children being born to *T. D.*, such child or children, if more than one, would be entitled to share equally with the other nephew and nieces, in the future rents and profits, from the time of their respective births; and that to such child or children the provision as to education and maintenance would also apply, as well as to the nephew and nieces named in the will. *Darker v. Darker*, 850

4. *Held*, also, that the testator did not intend that his brother, *T. D.*, should give up the house on the youngest niece attaining twenty-one.

Ibid.

5. *A.* being possessed of considerable estates, which were his old family estates, and having also purchased several estates for money considerations, and exchanged several parts of the family estates for other lands, and amongst others for the estate in question, devised as follows: "I give and devise all my messuages, tenements, mills, lands, rents, hereditaments, and real estates whatsoever, which I have heretofore from time to time '*purchased*' from different persons in the several deeds and conveyances thereof named, &c., to my sisters, *A. M.* and *E. M.*:"—*Held*, that the estate which the testator had obtained in exchange passed to his sisters under this devise as part of the purchased estates. *Doe d. Meyrick v. Meyrick*, 820

II. Evidence to explain.

A testator, by his will, after giving certain premises to his wife for life, devised as follows: "And after her decease to my nephew, *Morgan Morgan*, and his right heirs. Also, I give and bequeath unto my nephew,

M M M

Morgan Morgan, of the village of *Mothvey*," (certain premises therein mentioned) "to him and his right heirs, after my decease." It appeared that the testator had two nephews of the name of "*Morgan Morgan*," one of whom resided at the village of *Mothvey*, and the other elsewhere. *Semble*, that, upon proof of this fact, a latent ambiguity was raised, and that parol evidence of declarations of the testator, contemporaneous with the making of the will, was admissible to explain that ambiguity. *Doe d. Morgan v. Morgan*, 235

DISTRESS.

1. Where a landlord seized and sold, under a distress for rent, growing crops, which were afterwards taken away by the purchaser, and it appeared that the crops were sold for the full value which they would have fetched if sold at the proper time, and the rent proved to be due exceeded the amount for which the crops sold:—*Held*, in an action of trover brought by the tenant, that he was entitled to nominal damages only. *Proudlove v. Twemlow*, 326

2. Goods sent to an auctioneer to be sold on premises occupied by him are privileged from distress for rent. *Adams v. Grane*, 380

DISTRINGAS.

I. *Affidavit to obtain.*

1. The old practice, as to what was requisite to be stated in the affidavit on moving for a *distringas* on a *venire*, is applicable to the new process by writ of summons. *Johnson v. Rouse*, 26

2. It is not necessary, in moving for a *distringas*, on affidavits of inefficual attempts to serve the defendant at his dwelling-house with a writ of

summons, to shew that the party attempting to make the service left a copy of the writ at the dwelling-house. *Street v. Lord Alvanley*, 27

3. The affidavit to obtain a *distringas* must state that a copy of the writ of summons was left at the last time of calling. *Hill v. Maule*, 617

II. *Time of moving for.*

The plaintiff cannot move for a *distringas* until the expiration of eight days after a copy of the writ of summons has been left for the defendant on the last attempt to serve him personally. *Brian v. Stretton*, 74

EMBEZZLEMENT.

See SLANDER.

ERROR, WRIT OF.

See INFANT.

ESCAPE.

See DEBT.

EVIDENCE.

See AGREEMENT.

BOND.

DEVISE.

1. The order for an attachment for not paying the costs of a suit in equity is in itself *prima facie* evidence that a suit had been pending. *Blower v. Hollis*, 593

2. *Semble*, that a decree in equity is admissible in evidence, though it do not recite the bill and answer, and though no proof be adduced thereof. *Ibid.*

3. In an action upon an instrument, the subscribing witness to which is dead or resides abroad, it is necessary, besides proving the hand-writing of the subscribing witness, to give some

evidence of the identity of the party sued with the party who appears to have executed the instrument. *Whitlocke v. Musgrove*, 511

4. A person, on being sent by the defendant, an indorser of a bill of exchange, to the plaintiff, the indorsee, to inquire as to the solvency of *B.*, a prior indorser, went to the plaintiff's residence; and, on the street door being opened, a person in a dressing-gown, whom he had never seen before or since, asked him what his business was:—*Held*, not sufficient evidence of identity to let in evidence of the conversation. *Corfield v. Parsons*, 730

5. It is a question for the Judge, and not a point for the consideration of the jury, whether the evidence of identity is sufficient in such case.

Ibid.

6. *A.* contracted, in consideration of 220*l.* 10*s.*, to sell and plant a quantity of trees on *B.*'s land, and also that "he should and would, at his own costs and charges, well and sufficiently keep in order the trees aforesaid for two years after the planting, and that such as should die during that period, (except from injury by sheep, game or cattle), should be replaced by him."—*Held*, that evidence of nonperformance by *A.* of any part of the contract on his part was admissible in reduction of damages. *Allen v. Cameron*, 832

EXECUTION.

Semble, that by the Statute of Frauds, 29 *Car.* 2, c. 3, an outstanding term, vested in a trustee, upon trust to attend the inheritance, is liable to be seized under an execution against the *cestui que trust*, the owner of the inheritance. *Doe d. Phillips v. Evans*, 450

EXECUTORS AND ADMINISTRATORS.

See LEGACY DUTY.

1. An administrator sued a debtor to his intestate, and recovered a verdict against him; and the debtor, being in gaol, subsequently petitioned to be discharged under the Insolvent Act. The debtor offered terms, whereby he was to be liberated on payment of 150*l.*, a sum less than the costs incurred in the action. The administrator agreed to the terms, and liberated the debtor:—*Held*, in an action brought against him by a creditor of the intestate, that he was not chargeable with any part of the debt as assets. *Pennington v. Healey*, 402

2. Where a plaintiff, who was entitled to judgment against a defendant executor *de bonis testatoris, et si non*, &c., took judgment and issued execution for debt and costs *de bonis propriis*: the Court set aside the judgment and execution on motion. *Ward v. Thomas*, 532

3. An executrix pleaded the general issue, and *plene administravit*, and afterwards moved for judgment as in case of a nonsuit. The Court discharged that rule upon a peremptory undertaking to try the first issue, and allowed the plaintiff to withdraw his replication to the second plea, and take judgment of *assets quando*, &c. *Lucas v. Jenner*, 597

4. Where an administrator, having obtained possession of the intestate's effects, converted a sum of 10,875*l.* 8*s.* 9*d.* to his own use, and subsequently became bankrupt, before he had exhibited an inventory, or delivered in his account, pursuant to the condition of the administration bond, and before any decree of the Ecclesiastical Court to pay over the residue to the next of kin:—*Held*, that the conversion by the administrator of the intestate's effects to his own use, so

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that they were entirely lost to the estate, was a breach of the condition of the bond, "well and truly to administer the goods of the intestate according to law;" and that, in an action brought at the instance of the next of kin in the name of the Ordinary, the surety in the administration bond was liable for the full amount of the money so misapplied. *The Archbishop of Canterbury v. Robertson*, 690

5. Even if it be an answer to breaches assigned on the condition of an administration bond, for not exhibiting a perfect inventory, or making a true and just account at or before a particular day, that there was no Court held on that day, it must be pleaded in excuse of performance, and cannot be given in evidence where the defendant has pleaded only *non est factum*, and breaches have been suggested on the roll, pursuant to 8 & 9 Will. 3, c. 11, s. 8. *Ibid.*

6. The administrator is not bound by the administration bond to distribute the residue amongst the next of kin before there is a decree of the Ecclesiastical Court to pay over the residue. *Ibid.*

EXTENT IN AID.

1. In order to obtain an extent under 11 Geo. 4 & 1 Will. 4, c. 73, s. 3, against the principal and sureties in a recognizance entered into by the editor of a newspaper, the plaintiff must shew that he has used due diligence, and has not been able to procure satisfaction by writ of execution against the goods and chattels of the defendant. *Pennell v. Thompson*, 857

2. A crown debtor, who has issued prerogative process against his own debtor, is not entitled to continue those proceedings after he has paid the debt he owed to the crown. *Rex v. Bingham*, 862

FRAUDS, STATUTE OF.

FEME COVERT.

See ARREST.

FRAUDS, STATUTE OF.

1. Declaration stated that the plaintiff was possessed of a farm, upon which were certain growing crops, and on which the plaintiff had done certain work and labour, and expended certain materials in making the lands ready for tillage, of which work, labour, and materials he the plaintiff had not derived the benefit; and that, in consideration that the plaintiff would let the farm to the defendant for fourteen years, the defendant undertook to take the crops, and pay for them, and for the work, labour, and materials, according to a valuation: averments—that plaintiff let the farm accordingly, and left the crops upon it; and that the defendant took possession of the farm, and had the benefit of the work, labour, and materials; and that the valuation was made, but that the defendant did not pay. Plea—that the crops, and the benefit of the work, labour and materials, were not excepted or reserved out of the letting or agreement to let, and that there was no agreement in writing in respect of those causes of action, or any memorandum or note thereof, signed by the defendant, or any person by him lawfully authorized:—*Held*, on demurrer, that the contract was for an interest in land, and that the right to the crops, and the benefit of the work and labour, were both of them an interest in land, within the fourth section of the Statute of Frauds. *Earl of Falmouth v. Thomas*, 89

2. To an *indebitatus* count for crops bargained and sold, and under and by virtue of such bargain and sale, accepted and taken, and had and received and cut down by the defend-

ant, defendant pleaded that the crops, at the time of the bargain and sale, were growing upon and fixed to certain lands; and that before the bargain and sale there was a treaty on foot between the plaintiff and the defendant, by which it was proposed that the plaintiff should let the lands to the defendant, and that the defendant should take therewith the said crops; and that the defendant assented to the treaty; and that, in order to carry the treaty into effect, the supposed bargain and sale was verbally contracted between the plaintiff and defendant; and that there was no agreement in writing, or any memorandum or note thereof:—*Held*, that the crops were, at the time of the bargain and sale, an interest in the land, and that the case was within the Statute of Frauds. *Ibid*.

3. Same point held on a similar plea to account for work, labour, and materials. *Ibid*.

4. In *indebitatus assumpsit* upon an account stated defendant pleaded, that before the taking of the account there was a verbal agreement for the sale of certain crops growing upon the plaintiff's land, and for work, labour, and materials, done and used in preparing the land for tillage; and that there was a treaty for the plaintiff's letting and the defendant's taking the land for fourteen years, to which the defendant assented; and that the money to be paid for the crops, and the work, labour, and materials, was the money concerning which the account was stated; and that there was no agreement in writing, or any note thereof. To this plea the plaintiff replied, that, before the account was stated, the defendant had mown the crops and taken them to his own use, and had received the amount of the work and labour and materials. The defendant rejoined, traversing that he had cut down the crops, and received the

amount of work and labour, &c., before the stating of the account. General demurrer:—*Held*, that the contract, as appearing on the pleadings, was within the Statute of Frauds, and that the plaintiff could not recover. *Ibid*.

5. In *assumpsit* on a promise to manage a farm in a good and husband-like manner, and according to the custom of the country:—*Seemle*, that it is sufficient to assign a breach in the words of the promise. *Ibid*.

FRAUDULENT REMOVAL.

See LANDLORD AND TENANT.
BANKRUPT.

GAMING.

A match at cricket for 20*l*. is within the meaning of the sect. 2 of the 9 *Anne*, c. 14, and therefore illegal. And an action for money had and received to recover back the sum deposited may be maintained against the stakeholder, who has paid over the money after notice not to do so. *Hodson v. Terrill*, 797

GOOD JURY.

See Costs.

GOODS SOLD & DELIVERED.

Goods sold for ready money were packed up in boxes of the vendee for him and in his presence, but remained on the premises of the vendor:—*Held*, that goods sold and delivered would not lie. *Boulter v. Arnott*, 333

GROWING CROPS.

See DISTRESS.

GUARANTIE.

1. A guarantie in the following words: "I hereby agree to be an-

swerable for the payment of 50*l.* for *T. Lerigo*, in case *T. Lerigo* does not pay for the gin, &c. which he receives from you, and I will pay the amount :”—*Held*, not a continuing guarantie.
Nicholson v. Paget, 48

IMPARLANCE.

See PRACTICE.

INCLOSURE.

An old footway passed from a public highway over wastes to old inclosures into another public highway. By an award of the commissioners under a local act for inclosing the wastes, the part of the waste over which the footway ran was allotted; but the footway was not mentioned in the award, nor was any new way set out therein. No power to stop up ways over old inclosures was given by the particular Inclosure Act. *Held*, that the old footway was not extinguished by the allotment. *Thackrah v. Seymour*, 18

INDORSEMENT.

See BOND.

INFANT.

An infant sued by *prochein amy* and was nonsuited, and there was judgment against him for the costs. He sued out a writ of error, which was not proceeded with. After the return-day of the writ of error had expired, he was taken in execution on the original judgment:—*Held*, that he was not entitled to be discharged out of custody, and that it was not necessary that a *nonpros* should be signed to justify the execution. *Dow v. Clark*, 860

INNUENDO.

See LIBEL.

INTERPLEADER ACT.

INQUIRY, WRIT OF.

Defendant suffered judgment by default. Plaintiff executed a writ of inquiry in vacation and signed judgment, and took defendant in execution. The Court compelled the plaintiff's attorney to file the inquiry and subsequent proceedings.
Townsend v. Burns, 177

INSOLVENT.

1. The insolvent proceedings may be proved according to the mode prescribed by the late act 7 *Geo.* 4, c. 57, although the proceedings were commenced and took place under the former act 1 *Geo.* 4, c. 119. *Doe d. Phillips v. Evans*, 450

2. The provisions in the 7th section of the 1 *Geo.* 4, c. 119, with respect to the mode of conducting the sale of the insolvent's estate, are directory only. *Ibid.*

3. Where a prisoner petitioned the Insolvent Court to be discharged, but did not file his schedule within fourteen days, or give notice to the creditors of the filing of the petition, pursuant to the 7 *Geo.* 4, c. 57, and the plaintiff did not declare against him before the end of the second term:—*Held*, that he was not entitled to be discharged out of custody. *Molineux v. Browne*, 858

INTERPLEADER ACT.

1. Where a defendant has been indemnified by a third party for not delivering up property in his possession, he has no right to relief under the Interpleader Act, and the Court will discharge a rule obtained for that purpose, with costs. *Tucker v. Morris*, 73

2. A sheriff is not entitled to relief under the Interpleader Act, 1 & 2 *Will.* 4, c. 58, s. 6, where he has paid over the proceeds of the execu-

tion to the judgment creditor. *Anderson v. Calloway*, 182

3. On a motion by a sheriff for relief under the Interpleader Act, he ought to apply promptly; and where the sheriff seized under an execution on the 14th of *December*, and a rule which had been obtained to set aside the judgment and execution was discharged on the 22nd of *January*, and the sheriff on the 31st of *January* obtained a rule under the Interpleader Act, it was held, on cause shewn against that rule, that he ought to have applied sooner; and that the delay was unreasonable; and the Court discharged the rule with costs. *Cook v. Allen*, 512

4. *Seemle*, that he ought to have applied at the commencement of *Hilary* term, notwithstanding the rule pending to set aside the judgment. *Ibid.*

5. *Seemle*, also, that the sheriff should deny collusion. *Ibid.*

JUDGE'S ORDER.

1. An order, obtained from a Judge's clerk by mis-statement, is a nullity. *Woosnam v. Price*, 352

JUDGMENT AS IN CASE OF A NONSUIT.

See PRACTICE.

LANDLORD AND TENANT.

See DISTRESS.

1. Where a farm was taken for fourteen years, and the tenant was to pay a given sum for tillages and improvements done before he entered, and to receive the value of the tillages and improvements which he should leave on the farm, according to a valuation to be made at his quitting; and the tenant, in the first year of the tenancy, said that he would leave, and his landlord said he might; but no new bargain was made

as to his tillages and improvements:—*Held*, that he was not entitled to the value of the tillages and improvements which he left on so quitting. *Whittaker v. Barker*, 113

2. *W. & H.* by agreement, in *March*, 1827, became tenants to the plaintiff, for three years, of premises occupied by them as partners, with the power to them to extend the term to seven years, by giving the plaintiff a notice to that effect. In *January*, 1829, *W. & H.* gave notice accordingly. At *Midsummer*, 1828, *W.* retired from the partnership, and in *January*, 1829, *H.* entered into partnership with *S.*, and *H. & S.* carried on the business under the firm of *H. & S.* until 1831. The plaintiff gave receipts for the rent as received from *H.* after *W.* retired, and as received from *H. & S.* after *S.* became partner with *H.* In *February*, 1829, the plaintiff gave to *H.* a letter to the plaintiff's attorney, signifying that a lease might be made to *H. & S.*, but this letter was kept by *H.* and not acted upon, and no lease was prepared:—*Held*, that *W.* remained liable to the plaintiff for the rent accruing in 1831. *Graham v. Whichelo*, 188

3. Landlord and tenant, between whom there was a subsisting tenancy, agreed in writing for a letting of the farm upon different terms, the amount of the rent to be settled by valuation, and the tenant to find sureties for his paying the rent. The amount was not settled, and the sureties were not given:—*Held*, that the instrument, although it contained words of present demise, did not operate as a lease, or alter the terms of the existing tenancy. *John v. Jenkins*, 227

4. A plea to an avowry, of a tender of 16*l.*, will not be supported by proof of a tender of 15*l.* 16*s.*, although no more rent was due than the sum proved to have been tendered. *Ibid.*

5. *Seemle*, that it is a question for

the jury, whether a removal was fraudulent within the statute 11 *Geo.* 2, c. 19, although it be admitted at the trial by the tenant that the removal was to avoid a distress. *Ibid.*

6. Covenant on an indenture of lease whereby the tenant covenanted to pay the rent of 50*l.* half-yearly, and, over and above the reserved rent, the further yearly rent of 5*l.* for every acre of the demised premises which the defendant should convert into tillage over and above one-third part thereof. Breach assigned for over tillage, whereby defendant became liable to pay 75*l.* additional rent. Pleas, *first*, That, after the committing of the supposed breaches of covenant, the plaintiff, with a full knowledge of the supposed breaches of covenant, accepted and received from the defendant 25*l.*, *as and for all the rent due*, in respect of the premises, up to and inclusive, &c., (covering the time alleged in the breach), *without demanding or requiring the payment of such penalty or additional rent, and thereby then and there waived, gave up, and dispensed with his right to receive or recover any nomine pœnæ, or penalty, or such additional rent.* *Secondly*, That, after the committing of the breaches of covenant, the plaintiff, with a full knowledge, &c., *waived, gave up, and dispensed with all claim or right on his part to receive, recover, or be paid any such penalty, nomine pœnæ, or additional rent.* On a general demurrer both pleas were held insufficient. *Denton v. Richmond*, 734

7. A tenant held under the terms of an expired lease, by which it was stipulated that the tenants on quitting the farm should not sell or take away any of the manure in the fold, but should leave it to be expended on the land by the landlord or his succeeding tenant. The lease contained no stipulation as to the tenant

being entitled to payment "for such manure. By the custom of the country, the tenant would have been bound not to sell or take away the manure in the fold, but to leave it to be expended on the land by the landlord or his succeeding tenant, and would have been entitled to be paid for the same:—*Held*, that, as an express stipulation had been made on the subject, the custom was excluded, and that the tenant was not entitled to be paid for the manure. *Roberts v. Barker*, 808

LATENT AMBIGUITY.

See DEVISE.

LEASE.

See LANDLORD AND TENANT.

LEGACY DUTY.

1. By the marriage settlement of Mrs. C., 20,000*l.* was vested in D., E., and F., upon trust, to pay the dividends to Sir P. F. for life, and after his death to Mr. C. for his life, with remainder to Mrs. C. for her life, and with a power of appointment amongst her children, in case there should be any; and, in default of issue, to such persons as she should by will appoint, in case she died in her husband's lifetime, or by deed or will, in case she should survive her husband; and in default of appointment, amongst her next of kin. Mrs. C. died in her husband's lifetime, having, by her will, appointed this sum of 20,000*l.* to certain persons mentioned in her will:—*Held*, that legacy duty was payable on the 20,000*l.* *In the matter of Cholmondeley*, 149

2. A rule was obtained under the 42 *Geo.* 3, c. 99, s. 2, for the surviving executor of the executrix of the executor of a testator, to account for legacy duties due on the estate of the

original testator. It appeared that the original testator died in 1812; that the surviving executor had never acted, except in signing documents; that he knew nothing of the estate of his testatrix, and that he had received no assets of hers, or of the original testator:—*Held*, that the power given to the Court by the above statute is discretionary, and that the case was not one in which they ought to exercise it. *Re Pigott*. 827

LIBEL.

1. A count for a libel stated that defendant published a false libel of and concerning the plaintiff, containing, amongst other things, the false, &c., matter of and concerning the plaintiff, that is to say: "Threatening letters.—The *Middlesex* Grand Jury have returned a true bill against a gentleman of some property, named *French*," (meaning the said plaintiff), "with this, that the said plaintiff will verify that the said defendant thereby then and there meant to insinuate and have it understood, that the said plaintiff had been suspected to have been, and had been, guilty of the offence of sending a letter without any name or signature thereto subscribed, directed to one — *Trotter*, threatening to kill and murder the said — *Trotter*, a subject of the realm, with a view and intent to extort:"—*Held*, first, that the innuendo at the conclusion of the count was bad; and secondly, that the matter was libellous without such innuendo, which might be rejected as surplusage. *Harvey v. French*, 11

2. *A.* was engaged to superintend the works of a railway company, and subsequently, at a general meeting of the proprietors, the engagement was not continued, but a former inspector was reinstated. A vacancy subsequently occurred in the situation of engineer to the commissioners for the

improvement of the river *Wear*, and *A.* became a candidate. *B.* wrote to *C.*, introducing *D.* as a candidate, and *C.*, having written to *B.*, informing him that another person had succeeded in obtaining the appointment, *B.* wrote an answer to *C.*, reflecting on the conduct of *A.* whilst in the situation of engineer to the railway company. There was a subsequent election, at which *A.* was unsuccessful in consequence of this letter having been shewn. It appeared that *B.* and *C.* were both shareholders in the railway company, and that *B.* managed *C.*'s affairs in the railway. *B.* had not been applied to for his opinion, and the letter, containing the libel, was written after the termination of one election, and before the other was in contemplation:—*Held*, in an action by *A.* against *B.* for the libel, that the letter was not a privileged communication. *Brooks v. Blanchard*, 779

3. In an action for libel, the libel as set out on the record imputed to the plaintiff "mismanagement, or ignorance." The evidence was, that the expression in the libel (which had been destroyed) was "ignorance, or inattention:"—*Held*, a fatal variance. *Ibid.*

LIEN.

See ATTORNEY.

To a count in detinue for detaining a horse, the defendant pleaded that the plaintiff had delivered the horse to him to be stabled and taken care of, and fed and kept by him for the plaintiff, for reward; and that 10*l.* became due to him from the plaintiff as a reasonable reward, and so justified the detainer for that sum:—*Held*, on general demurrer, that the plea was bad, and that a person to whom a horse was so bailed had no lien. *Judson v. Etheridge*, 743

LIMITATIONS, STATUTE OF.

See BILLS AND NOTES.

1. An acknowledgment, to take a case out of the Statute of Limitations, must be such as will raise the implication of a promise to pay:—*Held*, that the following letter did not raise the implication of a promise to pay, and was not sufficient to take the case out of the statute:—"In reply to your application of the 19th instant, for the payment of 89*l.* 10*s.* 11*d.* to Mr. D. *Brigstocke*, I beg to say, that it is a claim I am by no means prepared to admit to the full extent; and to make the following observations respecting it. Of that sum, 68*l.* 3*s.* 8*d.* is made up of items for business and materials, stated to have been done and furnished between the years 1817 and 1824, a period during which I was concerned in two successive partnerships, to one or other of whom the accounts Mr. B. was entitled to recover ought to have been charged. Having at different times wound up both those concerns, and quitted *Carmarthen* as long back as the year 1824, I was surprised to receive Mr. B.'s bill in 1829, five years afterwards; and it is certainly not a little strange, that he should then send in a charge of so old a date, when, if any account was due, it could hardly be expected that the means would remain of ascertaining its correctness. I cannot, therefore, allow, that I am liable to pay any part of the account previous to the year 1825; but, as I anticipate being in *Carmarthen* shortly, I will then communicate with Mr. B. personally respecting it. The remainder of the account is for repairs ordered by an agent under the late firm of *Robert Smith & Co.*, to be done at the works in *Carmarthen*, in 1827, together with a few items for glazing in the year 1825, making together 20*l.* 17*s.* 5*d.*, which I believe

to be correctly charged, and for which I enclose a check, and will thank you to acknowledge the receipt of it."

Brigstocke v. Smith, 483

2. A promise in writing, signed by the party chargeable thereby, to pay his *proportion* of a joint debt more than six years old, is a sufficient compliance with the provisions of the 9 Geo. 4, c. 14, s. 1, to take the case out of the Statute of Limitations, though no amount is specified in the promise; and a plaintiff suing on such promise is not confined to nominal damages, but may recover the whole of such proportion upon proving the amount by extrinsic evidence. *Lechmere v. Fletcher*, 623

3. A. and B. were jointly indebted to C.; after more than six years had elapsed since the debt accrued, A. promised in writing signed by him to pay his proportion when applied to. Afterwards, C. sued A. and B. jointly, in *indebitatus assumpsit*, on the original joint cause of action. B. pleaded the general issue, and A. pleaded the general issue and the Statute of Limitations. A verdict passed against B. on the general issue, and for A. upon the general issue and upon the issue on the Statute of Limitations, and judgment was entered for C. against B. and for A. against C. C. afterwards brought a fresh action against A., and declared specially on the new promise to pay his proportion:—*Held*, that neither the recovery against B., nor the verdict and judgment for A., were any answer to the action against A. on the new promise. *Ibid.*

4. Payment of money into Court on a special count framed on such new promise to pay the defendant's proportion, and averring the amount of such proportion under a *videlicet*, does not admit, or preclude the defendant from disputing, the amount of such proportion. *Ibid.*

MALICIOUS ARREST.

See Costs under 43 Geo. 3.

MARRIAGE SETTLEMENT.

Construction of.

By marriage settlement, land was conveyed to trustees to the use of the husband for life, and from and after his decease, in case the wife survived him, To the use and intent that the wife should receive 14s. per week; and subject thereto that the trustees should, from time to time, and at all times thereafter, stand possessed of the residue to the use of all and every the child and children of his former wife, namely, *A. B., C. D., E. F., G. H., and I. K.*, and their issue lawfully begotten and to be begotten, equally to be divided between and amongst them in equal shares and proportions, as tenants in common, and not as joint tenants, and his, her, or their respective issues:—*Held*, that the five children took estates for life, and that no estate was taken by grandchildren born after the settlement and before the death of the settlor, the husband, or by grandchildren born after his death. *Wheeler v. Duke*, 210

MEMORANDA. 1, 466

MISNOMER.

The mistake of "*Lawrance*" instead of "*Lawrence*" in the name of the defendant in a writ of *capias* is immaterial. *Webb v. Lawrence*, 806

MONEY HAD AND RECEIVED.

See GAMING.

NEW TRIAL.

1. The Court will only grant a new trial when the verdict is under 20*l.*, where they can grant it without costs. Where a tender of 12*l.* 10*s.* was pleaded, and found for the defendant,

with a verdict for 19*l.* 10*s.* for the plaintiff, on *non-assumpsit* pleaded to the rest of the demand the Court refused to hear a motion for a new trial, as against evidence. — *v. Phillips*, 26

2. A jury having assessed damages upon an erroneous principle, the Court, in granting a new trial, refused to limit the inquiry to the question of damages. *Mahoney v. Frasi*, 325

NOTICE.

I. Of Action.

See ACTION.

II. Of Dishonour.

See BILLS AND NOTES.

III. Of Declaration.

See PRACTICE.

IV. Of Trial.

Short notice of trial in country causes means in all cases four days peremptorily. *Lawson v. Robinson*, 499

V. Of Countermand.

A defendant's undertaking to accept short notice of trial, does not entitle the plaintiff to give less than the usual notice of countermand. *King v. Jones*, 71

OFFICE.

1. A person appointed under the 44 *Geo. 3*, c. 1, to the office of paymaster of exchequer bills, holds his office during the pleasure of the lords commissioners of his Majesty's Treasury, and not during good behaviour or for life. The lords commissioners of the treasury have no authority under the above act to appoint a paymaster for life; and a general appointment, though under their seals, does not give more than an estate during pleasure. *Semble*, that the appointment

by the lords commissioners of the treasury of a new paymaster in the place of a former one is in itself a determination of their pleasure, and a revocation of the appointment of the former paymaster. *Smyth v. Latham*, 547

2. *Held*, that it is clearly so as against a plaintiff whose right of action is founded on the appointment of the defendant to the same office, and on his receipt of the same salary. It is immaterial that the second appointment contained no express clause of revocation, and that in the first appointment the lords commissioners reserved to themselves no power of revocation. *Ibid.*

3. In an action for money had and received, brought by the paymaster under the first appointment against the paymaster under the second, for fees received by him:—*Held*, that it was not necessary for the defendant to prove the fact of the resignation of the plaintiff, although it was stated on the deed of appointment of the defendant that the plaintiff had resigned. *Ibid.*

OUTLAWRY.

1. The King's warrant and the Attorney-General's consent, for the payment of money in the hands of the sheriff under a *capias utlagatum*, do not amount to an appropriation of that money, where they are granted in ignorance of the death of the defendant; and the Court, on a plea by his representatives, suggesting the death, will stay the making of an order for the payment, until the fact of the death is determined on an issue taken on the plea. *Rex v. Buchanan*, 195

2. An affidavit, stating that the defendant died on such a day, and that the deponent had seen him in his coffin, is sufficient for the purpose of reversing an outlawry, where the

PAYMENT INTO COURT.

defendant dies abroad; and the ordinary rule that there must be a certificate from the minister of the parish where the party died or was buried, does not apply. *Ibid.*

3. A *distringas* for the purpose of proceeding to outlawry will be granted upon affidavit, upon which the Court would not grant a *distringas* for the purpose of proceeding to enter an appearance for the defendant. *Hewitt v. Melton*, 720

OUTSTANDING TERM.

See EXECUTION.

PARTNER.

See BANKER.
BANKRUPT.

1. *A. B.*, at the request of the plaintiff, became the holder of shares, for the benefit of the plaintiff, in a company to which the plaintiff was solicitor. The plaintiff paid the deposits and all expenses on the shares. In an action by him against a member of the company, for money laid out for the use of the company, advertizing and in journeys:—*Held*, that the plaintiff could not recover, as being the real (though *A. B.* was the ostensible) partner. *Goddard v. Hodges*, 33

2. One of two partners, joint tenants of a house where their joint business is carried on, has a right to authorize a joint weekly servant to remain in the house, though the other partner has regularly given him a week's notice to leave the service. *Donaldson v. Williams*, 345

PAYMENT OF MONEY INTO COURT.

See LIMITATIONS, STATUTE OF.

PAYMENT.

I. *Appropriation.*

A general payment must be applied to a prior legal, and not to a subsequent equitable, demand. *Goddard v. Hodges*, 33

II. *Effect of.*

Quere the effect of receiving the payment of a debt, which has been made the subject of a set-off; after such set-off has been pleaded, or notice thereof given with the plea of the general issue. *Jackson v. Godard*, 46

PENAL ACTION.

See SHERIFF.

PLEADING.

See ADMINISTRATOR.

AMENDMENT.

SHERIFF.

I. *Declaration.*

1. In *assumpsit* on an agreement, whereby plaintiff agreed to procure a lease to be granted to defendant, and defendant agreed to pay the plaintiff, his solicitor, or agent; on request, the sum of 25*l.* in full for his share or proportion of the costs and expenses of the agreement, and of the lease:—*Held*, that the declaration was good without an averment that any costs or expenses had been incurred. *Townsend v. Burns*, 177

It is not necessary, since 2 *Will.* 4, c. 39, to state in a declaration in the *Exchequer*, that the plaintiff is a debtor to the king, or that he is less able to pay the king's debts. *Hirst v. Pitt*, 324

3. In a declaration by indorsee of a bill against indorser, it is not necessary to allege a special acceptance at a particular place or a presentment at such place. It is sufficient to state a general presentment to the drawee,

without stating any acceptance, and to prove the presentment at the particular place pointed out by the acceptance. *Parks v. Edge*, 429

4. *A.*, having been illegally arrested on mesne process, applied to the Court to be discharged. The rule was referred to a Judge at chambers, who ordered him to be discharged, and would have given him the costs of the rule if he would have undertaken to bring no action; but, as he refused to give such undertaking, nothing was ordered as to costs. In an action of trespass and false imprisonment brought by *A.* for the arrest, it was held, *first*, that he was entitled to recover those costs as special damage if properly laid in his declaration; and, *secondly*, that, as the declaration only alleged that he had been forced and obliged to pay and had paid *C.*, he could not recover the whole of the bill of costs of his attorney which he had not paid, though he was liable to pay them; but that he might recover so much of the bill of costs as consisted of money actually paid by the attorney, as that might be considered as money paid by him through his agent. *Pritchett v. Boovey*, 775

5. *Semble*, that under an averment that he had been forced and obliged to, and had become liable, &c., he might have recovered damages for such liability. *Ibid.*

II. *Plea in Abatement.*

The plaintiff declared as Earl of *S.*; the defendant pleaded in abatement that the plaintiff was not Earl of *S.*:—*Held*, that the plaintiff, in his replication, was bound to shew *how* he claimed the dignity. *Earl of Stirling v. Clayton*, 241

III. *Plea in bar.*

1. In a count for trespass and as-

sault, the defendant pleaded a justification in defence of a dwelling-house, with an averment "which is the same trespass &c.," and concluded with a traverse, *absque hoc* that he was guilty elsewhere than in the dwelling-house:—*Held*, that the *quæ est eadem* was sufficient, and that the traverse was surplusage, and bad on special demurrer. *Hembro v. Bailey*, 204

2. To a declaration upon a bond given by a collector of assessed taxes and his sureties, the defendant, a surety, pleaded pleas, shewing that the commissioners and receiver-general had not taken the steps to enforce payment from the collector, as directed by the acts relating to the assessed taxes:—*Held*, on general demurrer, that these pleas were bad. *Wilks v. Heeley*, 249

3. A plea that the commissioners have not seized the lands, &c. of the collector, must shew that there were lands, &c. of the collector, which might have been seized, and sold to supply the deficiency. *Ibid.*

4. A plea, to a declaration on a bail bond, that no *proper* affidavit of debt was filed, is bad. *Hume v. Liveridge*, 332

5. Where a plea professes to answer the whole of a count or counts, and is no answer to any good part of such count or counts, the plaintiff is entitled to judgment. *Crump v. Adney*, 362

6. A plea which professes to justify several assaults and false imprisonments laid in separate counts, must shew distinct occasions upon which the defendant was justified in committing each particular trespass. *McCurday v. Driscoll*, 618

7. Where a plaintiff amends his declaration with liberty to the defendant to plead *de novo*, if the defendant do not plead *de novo*, the former plea will stand, if it be applicable to the amended declaration. *Fagg v. Borsley*, 770

IV. *Replication.*

To an action on a promise to pay the debt of a third person, the defendant pleaded that there was no agreement in writing. *Semble*,—that the plaintiff must, in his replication, set out the agreement; and that he cannot take issue upon the plea. *Lowe v. Eldred*, 239

V. *Replication de injuriâ.*

1. In an action of assault and battery, *de injuriâ* is a good replication to a plea, stating that *J. E.* and *S. B.* were possessed of a close, and that the plaintiff was making noise, &c., and the defendants, as servants of *J. E.* and *S. B.*, and by their command, requested him to depart, and he refused, whereupon defendants, as the servants of *J. E.* and *S. B.*, gently laid hands, &c., and because plaintiff resisted, defendants, as servants, &c., and by command, &c., a little hurt, &c. *Piggott v. Kemp*, 197

2. An avowry stated that the plaintiff below was an inhabitant of a parish, and rateable to the relief of the poor in respect of his occupation of a tenement situate in the place in which, &c.; that a rate for the relief of the poor of the said parish was duly made and published, in which the plaintiff below was in respect of such occupation duly rated in the sum of 7*l.*; that he had notice of the rate, and was required to pay, but refused; that he was duly summoned to a petty sessions to shew cause why he refused; that he appeared, and shewed no cause, whereupon a warrant was duly made under the hands of two justices of the peace, directed to one of the defendants below, requiring him to make distress of the plaintiff's goods and chattels; that the warrant was delivered to the defendant, under which he, as collector, justified taking the goods as a distress, and prayed

judgment and a return. Plea in bar, *de injuriâ suâ propriâ absque tali causâ*. To this there was a special demurrer, assigning for cause, that the plea offered to put in issue several distinct matters, and was pleaded as if the avowry consisted merely in excuse of the taking and detaining, and not as a justification and claim of right:—*Held*, that the plea in bar was good. *Bardons v. Selby*, 500

VI. Variance.

In an action for libel, the libel as it was set out on the record imputed to the plaintiff "mismanagement or ignorance." The evidence was, that the expression in the libel which had been destroyed was "ignorance and inattention."—*Held* a fatal variance. *Brooks v. Blanshard*, 779

POWER OF APPOINTMENT.

See LEGACY DUTY.

1. By indentures of lease and re-lease, certain premises were conveyed to A. and his wife, after other uses, to such uses as M. S., by her last will and testament in writing, or any instrument in writing in the nature of, or purporting to be, her will, or by any codicil to be by her *duly executed and published under her hand and seal, in the presence of and attested by three or more credible witnesses*, notwithstanding her coverture, &c., should direct, limit, or appoint, &c. M. S. signed, sealed, and delivered, as and for her last will and testament, an instrument which concluded and was attested as follows:—"In witness whereof I have set my hand and seal hereto, this 5th day of August, A. D. 1801, in the presence of the underwritten—*Mary Swift*. (L. S.)—Signed, sealed, and delivered this 5th day of August, 1801, as the last will and testament of the said testatrix

M. S., who in her presence, and in the presence of each other, have put our names as witnesses thereof. H. F.—J. G.—R. F." *Held*, that the power was well executed. *Ward v. Swift*, 171

PRACTICE.

See ACTION.

AMENDMENT.

SCIRE FACIAS.

I. Attorney.

The attorney whose name was indorsed on the writ was not an attorney of the Court out of which the process issued, but was an attorney of the other Courts:—*Held*, so far a compliance with Rule 1, *Michaelmas Term*, 1 *Will*. 4, that the Court would not stay the proceedings *in toto*, but only until a proper attorney was appointed; but the costs of the application were ordered to be paid by the attorney whose name was so indorsed. *Constable v. Johnstone*, 88

II. Bail-Bond.

Though a plaintiff is not bound to declare *de bene esse*, yet if he do not, he cannot say that he has lost a trial, so as to have the bail-bond stand as a security on setting aside proceedings upon the bail-bond. *Balmon v. Morris*, 661

III. Capias.

If a writ of *capias* be issued into one county, on an affidavit of debt, and no proceeding be taken on it, another original writ of *capias* may be issued into another county on the same affidavit. *Rodwell v. Chapman*, 70

IV. Common Bail.

In the Exchequer the plaintiff has four terms to file common bail for the defendant, *sec. statute*. *Cook v. Allen*, 350

V. *Costs.*

1. Where a Judge, at the trial, in pursuance of the 1 *Will.* 4, c. 7, orders that the plaintiff shall have execution within a limited time, and judgment is thereupon entered up and execution is issued, the defendant is not precluded from applying to the Court above, to enter a suggestion to deprive the plaintiff of costs, under an act for a local Court of Requests, provided he comes to the Court within the first four days of the next term. *Baddley v. Oliver*, 219

2. *Semble*, that the amount found by the verdict of the jury, and not the sum which the plaintiff claims to be due, is to be considered the debt for which the action is brought, and by which the Court are to decide whether the plaintiff ought to have sued in the Court of Requests. *Ibid.*

VI. *Declaration, Notice of.*

Where a declaration is *filed*, it is deemed to be a good declaration only from the time of giving notice thereof; and, therefore, where a declaration *de bene esse* was filed, and the defendant entered an appearance before notice was given, the declaration, and all subsequent proceedings, were set aside for irregularity. *Weddle v. Brazier*, 69

VII. *Declaration, striking out Breaches in.*

A party had obtained from a Prerogative Court a general order to put an administration bond in suit against the surety, on the sole ground that the principal had not paid over the residue. On *non est factum* being pleaded, the plaintiff suggested breaches, not only for not paying over the residue, but on several other distinct parts of the condition. This Court refused to compel him to strike out the breaches on the other parts

of the condition, or to allow the defendant to let judgment go by default, and pay nominal damages on those breaches. *Archbishop of Canterbury v. Robertson*. 181

VIII. *Due Diligence.*

Due diligence was held to have been used in inquiring the name of a defendant, under the 32nd Rule of *Hilary Term*, 2 *Will.* 4, although no inquiries had been made of the defendant, or his immediate friends, or at his house or place of business, the debt being large, and the affidavits shewing that there was ground to fear he might abscond if he knew that proceedings were about to be instituted. *Hicks v. Marreco*, 84

IX. *Elegit.*

The Court will not alter the return of a writ of *elegit* to a later day; at all events, not at the instance of the sheriff, without the consent of the plaintiff. *Hildyard v. Baker*, 611

X. *Imparance.*

A defendant is not entitled to an imparance unless he appears. *Cook v. Allen*, 350

XI. *Judgment as in case of a Nonsuit.*

Where issue was joined in *Easter Term*, and notice of trial given for the second sittings in the same term, and the plaintiff did not proceed to try, but gave notice of countermand, and the defendant moved the same term for judgment as in case of a nonsuit:—*Held*, that the motion was premature. *Isaacs v. Goodman*, 494

XII. *Motion, Notice of.*

1. On motion to discharge a defendant, who had been more than twelve months in custody for a sum under 20*l.*, the Court will only grant a rule *nisi*, if no notice of motion has been

given; and they will not, even on the last day of term, grant a rule to be drawn up for shewing cause at chambers in the vacation, the act 48 Geo. 3, c. 123, directing the application to be made to the Court in term time. *Jones v. Fitzaddams*, 855

2. When the plaintiff has obtained a rule for a new trial, but neglected to take the cause down to trial for more than four terms, it is necessary to give a term's notice of motion to discharge such rule. *Deacon v. Fuller*, 349

3. The obtaining an order, by consent, to change the attorney, is not a proceeding in the cause so as to make it unnecessary to give such notice. *Ibid.*

XIII. Pleading issuably.

A defendant under terms to plead issuably may move to change the venue, if the Judge's order is not "on all the usual terms." *Russell v. Hurst*, 184

XIV. Process.

1. Where the writ was irregular, but the service was regular, and the defendant moved to set aside the service for irregularity, the Court discharged the rule. *Husker v. Jarmaine*, 408

2. A defendant was irregularly served with process early in the vacation:—*Held*, that he could not wait until the ensuing term, but was bound to have applied in the vacation if he wished to take advantage of the irregularity. *Cox v. Tullock*, 531

XV. Rule to plead.

1. Where a writ was issued in vacation and a declaration was delivered and rule to plead given in the same vacation, but the plaintiff did not sign judgment until the ensuing term:—*Held*, that it was not necessary to give a new rule to plead in that term. *Mould v. Murphy*, 495

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2. Declaration was delivered in *Easter* Term, and judgment was signed for want of a plea in *Trinity* Term, without giving a fresh rule to plead as of *Trinity* Term:—*Held*, that it was not necessary to give a new rule to plead as of that term. *Pryer v. Smith*, 855

XVI. Time for Pleading.

The defendant's time for pleading being out on the evening of the last day but two before the end of the term, he delivered a general demurrer for delay. The Court on the last day of the term granted a *concilium* for the rising of the Court, and then gave judgment for the plaintiff, refusing to let the defendant in to plead. *Wilson v. Tucker*, 795

XVII. Writ of Error.

This Court will not give a party leave to *nonpros* his own writ of error without payment of costs. *Wilkinson v. Malin*, 240

PRINCIPAL AND AGENT.

See BANKER.

PRIVILEGE.

1. On an application by the sheriff to quash a rule to return a writ of *fi. fa.*, it is not sufficient to shew that the defendant's name is in the list transmitted by the secretary of state to the sheriff's office, of persons privileged as attached to an embassy, in pursuance of stat. 7 Ann. c. 12, s. 5, but it must be clearly shewn that the defendant is in the actual and *bonâ fide* service of the ambassador. *Fisher v. Begrez*, 117

2. *Semble*, that a chorister, *bonâ fide* employed by an ambassador in the performance of religious worship in his chapel, is privileged under the 7th Ann. *Ibid.*

3. *Quære*, under what circumstances

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goods of a person so privileged would be protected from an execution? *Ibid.*

PRIVILEGED COMMUNICATION.

See LIBEL.

RENT, ADDITIONAL.

See LANDLORD AND TENANT.

REPLEVIN.

See LANDLORD AND TENANT.

1. It is sufficient if the sheriff take one pledge on a replevin for distraining cattle *damage feasant*.

Hucker v. Gordon, 58

2. A count against the sheriff for not restoring the goods, is bad. *Ibid.*

3. Counts against the sheriff for taking insufficient pledges in a replevin of cattle distrained *damage feasant*, should shew a *retorno habendo*. *Ibid.*

REPLICATION DE INJURIA.

See PLEADING.

RULES OF COURT—2, 261, 466, 865.

RULE TO PLEAD.

See PRACTICE.

SCIRE FACIAS.

1. The Court refused to allow a plaintiff to sign judgment on the return of *nihil* to two writs of *sci. fa.*, it not appearing that any endeavour had been made to give the party notice. *Sabine v. Field*, 466

2. A *sci. fa.* against bail may be tested after the return-day of the *ca. sa.* against the principal. *Sandland v. Claridge*, 672

3. The four days during which a *sci. fa.* against bail must lie in the sheriff's office need not be in term. *Ibid.*

4. In *scire facias* the bail were

SHERIFF.

summoned after eight o'clock on the evening before the return-day of the *scire facias*:—*Held* regular. *Lewis v. Pine*, 771

SERVANT.

See SLANDER.

SET-OFF.

See ATTORNEY.

Where there are cross demands, and the defendant pleads a set-off, the plaintiff is not obliged to prove the whole of his account in the first instance, but may prove only the balance which he claims; and after the defendant has proved his set-off, the plaintiff may prove other parts of his account to shew that a larger sum was due. *Williams v. Davis*, 464

SHERIFF.

See BAIL.

INTERPLEADER ACT.

REPLEVIN.

I. Liability of.

1. A sheriff who, under a writ of *feri facias*, seizes and sells goods of a bankrupt before commission, but after an act of bankruptcy, without notice of the act of bankruptcy, is liable in trover. *Balme v. Hutton*, 262

2. A sheriff's warrant against the plaintiff, directed to the defendant, a sheriff's officer, and one *W.*, was delivered to the defendant to be executed. The defendant employed *L.*, an assistant, to make the arrest, who accordingly arrested the plaintiff, and told the plaintiff, "he must go with him to the *Granby*," to which the plaintiff replied, "very well." He was then taken to a public house called the *Granby*, and kept there till the following morning, when *L.* delivered the plaintiff to *W.*, who, it appeared, was also an assistant to the

defendant, and who, within twenty-four hours from the time of the arrest, put the plaintiff on a coach for the purpose of taking him to prison, and took him there accordingly. At the time that the plaintiff was put upon the coach, the defendant was present, and saw the plaintiff on the coach. In an action on the 32 Geo. 2, c. 28, to recover penalties for taking the plaintiff to the tavern without his free and voluntary consent, and for taking him to prison within twenty-four hours:—*Held*, first, that the defendant was liable for the act of *W.* in taking the plaintiff to prison within the twenty-four hours—secondly, that to justify the officer in taking him to the tavern, the consent of the party arrested to be taken there was necessary; and that the mere submission or acquiescence of the plaintiff to the dictation of the officer was insufficient—thirdly, that the beginning to carry, and not the arrival at the prison, is to be considered as the carrying to prison—fourthly, that the neglect of the party arrested to nominate some safe and convenient dwelling-house to which he might be taken, did not justify the officer in taking the plaintiff to prison within twenty-four hours; and that it was the duty of the officer to call upon the party to nominate some house to which he might be taken, and that the plaintiff could not be said to have “refused to be carried to some safe and convenient dwelling-house,” until the officer had asked him to nominate. *Dewhirst v. Pearson*, 365

3. *A. fi. fa.*, directed to the coroner, issued on a judgment obtained by a plaintiff, and the plaintiff’s attorney indorsed thereon the name of *S.*, an officer of the sheriff, who, after the goods seized under the *fi. fa.* had been sold, received the proceeds from the broker, and did not hand them over. A person who had bought goods at the sale, which had been seized under

the *fi. fa.*, but which were afterwards claimed by a third party and taken away from him, brought an action against the sheriff for the purchase-money paid by him, the consideration having failed:—*Held*, that *S.* was not the officer of the sheriff but of the coroner, and that the defendant was not connected with the proceedings so as to be liable. *Sargeant v. Cowan*, 491

4. The Court will not set aside a return by a sheriff, upon motion on affidavits, though they shew a strong case of fraud and collusion. If the sheriff takes on himself to state facts which constitute a good return in point of law, the only remedy is by action for a false return. *Goubot v. De Croux*, 772

SLANDER.

1. Slander, for accusing plaintiff of felonious embezzlement. It appeared that the plaintiff had been chosen and sworn in at a court leet held by a corporation, as chamberlain of certain commonable lands. The duties of the chamberlain (who received no remuneration) were to collect monies from the commoners and other persons using the commonable lands; to employ the monies so received in keeping the lands in order; to account at the end of the year to two aldermen of the corporation, and to pay over any balance in his hands to his successors in office:—*Held*, that the plaintiff was not “a servant, or person employed in the capacity of a servant,” within the 7 & 8 Geo. 4, c. 29, s. 47, as to embezzlement. *Williams v. Stott*, 675

2. If a good innuendo in a declaration, ascribing a particular meaning to alleged slanderous words, be not supported in evidence, the plaintiff cannot reject it at the trial, and resort to another meaning. *Ibid.*

should be paid out of the purchase-money, and signed an authority to the auctioneer to that effect. The sale then proceeded, and the vessel was knocked down to *C.* for 300*l.* Immediately after the sale, *B.* and the other creditors applied to *C.* for payment, and he promised that he would, on the following *Thursday*, bring the purchase-money for the auctioneer to pay the creditors with. *C.* did not do so:—*Held*, that the agreement for payment of the repairs out of the purchase-money, of which *C.* was cognizant, and had assented to, precluded him from maintaining trover until such payment was made. *Norris v. Williams*, 842

UNDERTAKING.

1. At a meeting of the creditors of a bankrupt for the choice of assignees, the creditors all refused to become assignees, and requested *A. B.*, a stranger to the estate, to become assignee. *A. B.* stated that he would incur no liabilities; but, on the engagement of the solicitor to the commission to indemnify him against the consequences, *A. B.* consented to become assignee:—*Held*, that this engagement was not illegal. *Gilmour v. King*, 612

2. The solicitor of the *London* creditors of a bankrupt in the country wrote to *B.*, the solicitor of the country creditors of the same bankrupt, the following letter: "I am willing, on behalf of the *London* creditors, to bear two-thirds of the expense of Messrs. *B.* and *B.*, or such barrister as you may think fit for resisting Mr. *K.*'s proof under the commission, and of investigating the accounts of the assignees at the meeting on the 18th instant. *I hereby undertake to bear and pay on behalf of these creditors two thirds of the expenses incident thereto accordingly.*" And the meeting be-

WILL.

ing afterwards adjourned, *A.* wrote to *B.* another letter, in which he said, "I shall have no objection to bear as before the proportion of expense of the barrister attending the meeting stated in your letter:—"*Held*, that *A.* was personally liable for the proportion of the expenses. *Hall v. Ashurst*, 714

VARIANCE.

In an action for libel, the libel as it was set out on the record imputed to the plaintiff "mismanagement or ignorance." The evidence was, that the expression in the libel (which had been destroyed) was "ignorance, or inattention."—*Held*, a fatal variance. *Brooks v. Blanshard*, 779

VENUE.

Changing.

1. A motion to change the venue on special grounds ought to be made after plea pleaded.—*Colterill v. Dixon*, 661

2. The venue may be changed in an action upon a written agreement to pay a sum of money on a day certain, and if not then paid to secure the same by mortgage. *Slade v. Trew*, 584

WAIVER.

Where a copy of a rule served was not intitled in any cause, the party's appearing by counsel to take the objection does not operate as a waiver of the irregularity. *Wood v. Critchfield*, 72

WILL.

I. *Execution of.**See POWER OF APPOINTMENT.*

1. A will of lands, subscribed by three witnesses in the testator's presence and at his request, is well executed, though none of the witnesses

saw the testator sign it, and only two of them saw his signature. *Johnson v. Johnson*, 140

2. A codicil was duly executed and attested, and expressly referred to an unexecuted will on the same paper:—*Held*, that such execution gave effect to the will, and that it thereby became a good will of lands. *Doe d. Williams v. Evans*, 42

II. Revocation of.

Testator, seised of a reversion expectant on a term of years created as a mortgage for 1200*l.*, devised the same, and afterwards agreed with *A. B.*, that *A. B.* should pay off the old mortgage, and take an assignment of the term to secure that sum, and 1800*l.* more to be lent to the testator. The 1200*l.* was to be paid off immediately; and, until the 1800*l.* was procured, the term was to be assigned to a trustee for the testator. In pursuance of this agreement the 1200*l.* was paid off, and the term was assigned to *E. F.* in trust for the testator, his heirs and assigns, and to be held, assigned, and disposed of, as he or they should direct or appoint. Shortly afterwards the term was assigned by *E. F.*, by the direction of the testator, to *A. B.*, to secure the 3000*l.*:—*Held*, that the will was not revoked. *Johnson v. Johnson*, 140.

WITNESS.

See ATTACHMENT. EVIDENCE.

1. An action will lie against a witness for non-attendance in pursuance of a *subpœna*, although the plaintiff was not nonsuited, but withdrew his record in consequence of the absence of the witness. *Mullett v. Hunt*, 752

2. In a declaration in case for not attending as a witness in pursuance of a *subpœna*, there was no distinct allegation of a good cause of action in the original suit; but it was stated

that the defendant could have given material evidence for the plaintiff, and that without his evidence the plaintiff could not safely proceed to trial, and that by reason of his non-attendance, and because the plaintiff could not safely proceed to trial without his testimony, he was forced and obliged to, and did withdraw the *Nisi Prius* record.—*Held* sufficient after verdict. *Ibid.*

3. The same declaration alleged, that the *subpœna* was made known, and shewn to the defendant. The evidence was, that the *subpœna* was made known, and conduct money was taken by the witness, but the original *subpœna* was not shewn:—*Held*, that it was not necessary for the purposes of such action that the original *subpœna* should be shewn, (unless, perhaps, where the party demanded to see it), and that the part of the allegation as to shewing the *subpœna* might be rejected. *Ibid.*

4. A witness who was subpoenaed by the plaintiff in an action for use and occupation, and could have given evidence as to the use and occupation, and could also have rebutted a set-off which was expected to be insisted on as a defence, did not appear in pursuance of his *subpœna*. There was another witness as to the use and occupation. When the cause was called on, the counsel on both sides were absent. The attorney for the plaintiff proved that he could have handed over the draft brief to other counsel who were in attendance, and that he withdrew the record *solely* on account of the absence of the witness who did not appear:—*Held*, that the witness was liable in an action for not appearing in pursuance to his *subpœna*. *Ibid.*

5. It is a question for the discretion of the Master, in each particular case, whether the expenses of witnesses brought from abroad should be

900 WRIT OF SUMMONS.

allowed on taxation. The act of 1 *Will.* 4, c. 22, for the examination of witnesses on interrogatories, has made no alteration in this respect. *M'Alpine v. Palis*, 795

WRIT OF SUMMONS.

See ACTION, COMMENCEMENT OF.

1. If the notice of declaration be

WRIT OF SUMMONS.

for a different cause of action from that stated in the writ of summons, it is irregular. *King v. Skeffington*, 363

2. In *assumpsit* the writ of summons must follow the form No. 1, in the schedule to the 2 *Will.* 4, c. 39. If it do not, it is irregular. *Ibid.*

END OF VOL. I.

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